TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 451.

JAMES W. LUSK, WILLIAM C. NIXON, AND WILLIAM B. BIDDLE, RECEIVERS OF THE RAILROADS AND PROPERTY OF ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY, PLAINTIFFS IN ERROR,

vs.

J. T. BOTKIN, SECRETARY OF STATE OF THE STATE OF KANSAS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

FILED MAY 4, 1915.

(24,703)

(24,703)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1915.

No. 451.

JAMES W. LUSK, WILLIAM C. NIXON, AND WILLIAM B. BIDDLE, RECEIVERS OF THE RAILROADS AND PROPERTY OF ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY, PLAINTIFFS IN ERROR,

vs.

J. T. BOTKIN, SECRETARY OF STATE OF THE STATE OF KANSAS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 18, 1915.

1 In the Supreme Court of the State of Kansas.

Be it remembered, That on the 8th day of June, 1914, there was filed in the office of the Clerk of the Supreme Court of the State of Kansas, a certified copy of the Notice of Appeal and proof of service thereof, which notice of appeal, with endorsements thereon is in words and figures as follows, to-wit:

2 No. 19559.

In the District Court of Shawnee County, Kansas, First Division.

Filed June 8, 1914. D. A. Valentine, Clerk Supreme Court.

No. 28682.

JAMES W. LUSK, WILLIAM C. NIXON, and WILLIAM B. BIDDLE, Receivers of the Railroads and Property of St. Louis and San Francisco Railroad Company, Plaintiffs,

vs.

CHARLES H. SESSIONS, Secretary of State of the State of Kansas, Defendant.

Notice of Appeal.

To Charles H. Sessions, Secretary of State of the State of Kansas, Defendant, and

To J. S. Dawson, W. P. Montgomery, and F. P. Lindsay, Attorneys of record for said Defendant:

You are hereby notified that the plaintiffs James W. Lusk, William C. Nixon, and William B. Biddle, Receivers of the Railroads and Property of St. Louis and San Francisco Railroad Company, appeal to the Supreme Court of the State of Kansas, from the judgment of the District Court of Shawnee County, First Division, rendered by said court on May 16, 1914, in the above entitled case, sustaining said defendant's demurrer to said plaintiffs' amended petition in said case and rendering judgment in favor of the defendant and against the plaintiffs.

You are further notified that the original of this notice has been filed by said plaintiffs with the Clerk of the District Court of Shawnee County, Kansas.

W. F. EVANS,
R. R. VERMILION,
W. F. LILLESTON,
Attorneys for Plaintiffs, James W. Lusk, William C. Nixon, and William B. Biddle, Receivers of the Railroads and Property of the St. Louis and San Francisco Railroad Company.

Endorsements: #28682. In District Court of Shawnee Co. Kan. James W. Lusk et al. Plffs. v. Charles H. Sessions, etc. Deft. Notice of Appeal, Filed June 5, 1914, C. W. Bower, Clerk District Court.

3 In the District Court of Shawnee County, Kansas, First Division.

No. 28682.

JAMES W. LUSK, WILLIAM C. NIXON, and WILLIAM B. BIDDLE, Receivers of the Railroads and Property of St. Louis and San Francisco Railroad Company, Plaintiffs,

vs.

CHARLES H. SESSIONS, Secretary of State of the State of Kansas, Defendant.

Notice of Appeal.

To Charles H. Sessions, Secretary of State of the State of Kansas, Defendant, and

To J. S. Dawson, W. P. Montgomery and F. P. Lindsay, Attorneys of Record for said Defendant:

You are hereby notified that the plaintiffs James W. Lusk, William C. Nixon and William B. Biddle, Receivers of the Railroads and Property of St. Louis and San Francisco Railroad Company, appeal to the Supreme Court of the State of Kansas, from the judgment of the District Court of Shawnee County, Kansas, First Division, rendered by said court on May 16, 1914, in the above entitled case, sustaining said defendant's demurrer to said plaintiff's amended petition in said case and rendering judgment in favor of the defendant and against the plaintiffs.

You are further notified that the original of this notice has been filed by said plaintiffs with the Clerk of the District Court of Shawnee County, Kansas.

W. F. EVANS,
R. R. VERMILION,
W. F. LILLESTON,
Attorneys for Plaintiffs, James W. Lusk, William C. Nixon, and William B. Biddle, Receivers of the Railroads and Property of the St. Louis and San Francisco Ry. Co.

4 We, the undersigned attorneys of record for Charles H. Sessions, Secretary of State of the State of Kansas, defendant in the above entitled case, do hereby acknowledge due and legal service by plaintiffs, of the above and foregoing notice of appeal, on us, at the City of Topeka, Shawnee County, Kansas, on this 5th day of June, 1914.

JOHN S. DAWSON,
Att'y Gen'l;
F. P. LINDSAY,
W. P. MONTGOMERY,
Attorneys for Defendant, Charles H. Sessions, Secretary of State of the State of Kansas.

I, Charles H. Sessions, Secretary of State of the State of Kansas, the defendant named in the attached Notice of Appeal, do hereby acknowledge due and legal service by plaintiffs of the two attached and foregoing notices of appeal, on me at the City of Topeka, Shawnee County, Kansas, on this 5th day of June, 1914.

CHAS. H. SESSIONS,
Secretary of State of the State of Kansas, Defendant.

5 STATE OF KANSAS,
County of Shawnee, ss:

I, W. F. Lilleston, of lawful age, being first duly sworn, upon oath, depose and say:

That for and on behalf and at the request of the plaintiffs, James W. Lusk, William C. Nixon and William B. Biddle, Receivers of the Railroads and Property of St. Louis and San Francisco Railroad Company, I did, on the 5th day of June, 1914, serve the attached notice of Appeal upon defendant Charles H. Sessions, Secretary of State of the State of Kansas, and upon John (J) S. Dawson, attorney of record for said defendant, by delivering to said defendant and his said attorney of record, and each of them personally, an exact signed copy of the attached Notice of Appeal, and that I am one of the attorneys for said plaintiffs and was lawfully authorized to serve said Notice of Appeal as aforesaid and to make this affidavit.

W. F. LILLESTON.

Subscribed and sworn to before me, by W. F. Lilleston, this 5th day of June, 1914.

[SEAL.]

LEW L. COLLINS,
Notary Public in and for the
County of Shawnee, State of Kansas.

My commission expires Sept. 1, 1914.

Endorsements: #28682. In District Court of Shawnee Co., Kan. James W. Lusk et al. Pl'ff, v. Charles H. Sessions, etc. Acknowledgment & Proof of Service of Notice of Appeal, Filed June 5, 1914, C. W. Bower, Clerk District Court.

6 Whereas, Be It Remembered, That on the 16th day of May, A. D. 1914, in the Shawnee County District Court, Third Judicial District, State of Kansas, before the Honorable A. W. Dana, presiding Judge of the first division, it being at the April 1914, term of said Court, the following proceedings among others, were had to-wit:

No. 28682.

JAMES W. LUSK, WILLIAM S. NIXON, and WILLIAM B. BIDDLE, Receivers of the Railroads and Property of St. Louis and San Francisco Railroad Company, Plaintiffs,

vs.

CHARLES H. SESSIONS, Secretary of State of the State of Kansas, Defendant.

Now, on this ninth day of May, A. D. 1914, the above entitled action comes on for hearing upon the demurrer heretofore filed by said defendant to the amended petition of the plaintiffs in this action, and the plaintiffs appear by W. F. Evans, R. R. Vermilion and W. F. Lilleston, their attorneys; and the defendant appears by J. S. Dawson, W. P. Montgomery and F. P. Lindsay, his attorneys, and said demurrer is submitted to the court and the same taken under advisement; and on this sixteenth day of May, A. D. 1914, the court being fully advised in the premises, orders and adjudges that the said demurrer of the said defendant be and the same is hereby sustained, to which judgment and ruling the plaintiffs except; whereupon the plaintiffs decline to plead further and elect to stand upon their amended petition.

It is therefore considered, ordered and adjudged by the court that the plaintiffs take nothing by this action and that the defendant have and recover of and from the plaintiffs the costs of this action taxed at $—, to which judgment plaintiffs except.

A. W. DANA, *Judge.*

O. K.
J. S. DAWSON, *Att'y Gen'l,*
Att'y for Def't.

O. K.
R. R. VERMILION,
Att'y for Pl'ff.

7 *Certificate.*

STATE OF KANSAS,
Shawnee County, ss:

I, C. W. Bower, Clerk of the District Court within and for the County and State aforesaid, do hereby certify that the above and foregoing is a full, true and correct copy of Notice of Appeal, Acknowledgment of Proof of Service of Notice of Appeal, Affidavit of W. F. Lilleston of Service of Notice of Appeal, Order Sustaining Defendant's Demurrer to Amended Petition, in the above entitled cause, as the same appears on file and of record in my office.

Witness my hand and the seal of said court, hereunto affixed at my office in the city of Topeka, this 6 day of June A. D. 1914.

[SEAL.]

C. W. BOWER, *Clerk,*
By JESSIE M. CURTIS,
Deputy Clerk.

(Endorsed:) 19559. James W. Lusk, et al. Receivers, etc. Appellant- vs. Charles H. Sessions, Sec. etc. Appellee. Notice of Appeal and Transcript. Filed June 8, 1914. D. A. Valentine, Clerk Supreme Court.

8 That afterwards, on the 4th day of September, 1914, there was filed in the office of the Clerk of the Supreme Court of the State of Kansas, the appellants' abstract of the record, which abstract is in the words and figures, as follows, to-wit:

9

19559.

Filed Sep. 4, 1914. D. A. Valentine, Clerk Supreme Court.

Number 19559.

In the Supreme Court of Kansas.

JAMES W. LUSK, WILLIAM C. NIXON, and WILLIAM B. BIDDLE, Receivers of the Railroads and Property of St. Louis and San Francisco Railroad Company, Appellants,

vs.

CHARLES H. SESSIONS, Secretary of State of the State of Kansas, Appellee.

Appeal from the District Court of Shawnee County, Kansas, First Division.

A. N. Dana, Trial Judge.

Appellants' Abstract of Record.

R. R. Vermillion, Attorney for Appellants.

9a

Number 19559.

In the Supreme Court of Kansas.

JAMES W. LUSK, WILLIAM C. NIXON, and WILLIAM B. BIDDLE, Receivers of the Railroads and Property of St. Louis and San Francisco Railroad Company, Appellants,

vs.

CHARLES H. SESSIONS, Secretary of State of the State of Kansas, Appellee.

Appeal from the District Court of Shawnee County, Kansas, First Division.

A. N. Dana, Trial Judge.

Specification of Errors Complained of by Appellants.

I.

The court below erred in rendering judgment sustaining defendant's demurrer to the plaintiffs' amended petition.

II.

The court below erred in rendering judgment in favor of the defendant and against the plaintiffs for costs.

III.

The court below erred in rendering judgment sustaining defendant's demurrer to plaintiffs' amended petition, and in favor of the defendant and against the plaintiffs for costs.

IV.

The court below erred in rendering judgment in favor of the defendant and against the plaintiffs.

9b On April 13, 1914, the plaintiffs filed in the District Court of Shawnee County, Kansas, First Division, their amended petition, which, omitting the caption, signature of counsel, endorsements and filing marks, was as follows:

Amended Petition.

Comes now the plaintiffs in this action and for their amended petition against the defendant herein, state that the defendant is now, and for more than two years last past, has been the duly elected, qualified and acting Secretary of State of the State of Kansas. That the plaintiffs herein are the duly appointed, qualified and acting Receivers of the railroads and property of St. Louis & San Francisco Railroad Company, having been so appointed by the judgment of the District Court of the United States within and for the Eastern Division of the Eastern District of Missouri, and are now in possession and control of all of the property of said railroad company. That said St. Louis & San Francisco Railroad Company is now, and was on the 30th day of June, 1896, and ever has been a corporation duly organized and existing under and by virtue of the laws of the State of Missouri, and authorized to own, construct, acquire by purchase and lease and operate railroads in the State of Missouri and in the State of Kansas and other states.

That on the 30th day of June, 1896, the said St. Louis & San Francisco Railroad Company, being a corporation organized as aforesaid, and for the purpose afore stated, having acquired by
9c purchase and construction certain lines of railroad in the State of Missouri, desired to purchase and acquire and construct certain other and further lines of railroad in the State of Kansas, and to operate the same as a common carrier for hire. That for the purpose of carrying out said purpose and securing authority to own, purchase, lease, construct, maintain and operate a railroad or railroads in the State of Kansas, the said St. Louis & San Francisco Railroad Company, in pursuance of the provisions of Chapter 186 of the Session Laws of the State of Kansas of 1887, duly filed with the Secretary of State of the State of Kansas, a copy

of its charter and Articles of Incorporation, together with a certified copy of a resolution of its Board of Directors, authorizing service of process to be made upon any of its officers or agents in the State of Kansas, engaged in transacting its business in the same manner as might be provided by law for the service of process upon railroad corporations of the State of Kansas; and said resolution further contained a stipulation that said St. Louis & San Francisco Railroad Company should be and become subject to the provisions of said Chapter 186 of the Session Laws of 1887 of the State of Kansas; and said St. Louis & San Francisco Railroad Company fully complied with all the provisions of said law and became vested with the right and authority to own, by purchase and lease, and to construct, operate and maintain, a railroad or railroad lines in the State of Kansas. That in pursuance of the provision of said Chap-
9d ter 186 of the Laws of 1887 of the State of Kansas, and by the authority so obtained by complying with the provisions of said law as hereinbefore stated, and relying upon the same, the said St. Louis & San Francisco Railroad Company did, thereafter purchase a line of railroad extending from the east line of the State of Kansas through the Counties of Cherokee, Labette, Montgomery, Wilson, Greenwood, Butler, Sedgwick, Harvey, Reno, Rice and Ellsworth, and constructed certain other lines of railroad in Labette, Crawford, Bourbon and Cowley Counties, in the State of Kansas, and also leased certain other lines of railroad extending through the Counties of Wyandotte, Johnson, Miami, Linn, Bourbon, Crawford and Cherokee, in the State of Kansas. That said St. Louis & San Francisco Railroad Company, relying upon the provisions of said law and the authority to acquire and operate railroads in the State of Kansas through the counties hereinbefore named, and other counties, from the 30th day of June, 1896, until the first day of January, A. D. 1913, expended large sums of money in acquiring said above described railroads, and improving the same and building depots, side tracks and other terminal facilities necessary to enable it to operate said railroad in its business as a common carrier. That at the time said St. Louis & San Francisco Railroad Company so purchased, constructed and leased said railroad lines above described, and constructed said depots and side tracks, there was no law in the State of Kansas that required the said St. Louis & San Fran-
9e cisco Railroad Company to pay an annual corporation tax to the state of Kansas or to the Secretary of State of the State of Kansas on the capital stock of said railroad company. That said St. Louis & San Francisco Railroad Company now has, and had at all times herein stated, issued and outstanding and paid up Five Hundred Thousand (500,000) shares of capital stock of the par value of One Hundred ($100.00) Dollars each. That said capital stock was at all of said times and is now invested in and devoted to and used in acquiring the railroad line and lines and other property in the manner hereinbefore described, and in operating the same, which said line and lines of railroad extend from points in the State of Kansas to and into the States of Missouri, Oklahoma, Texas, Arkansas, Tennessee and other states, and were used and operated at all of said times by said St. Louis & San Francisco Rail-

road Company, and are now being used and operated by the plaintiffs herein as a railway system over which and by means of which they carry on commerce between the several states above named.

Plaintiffs state that the defendant herein as Secretary of State of the State of Kansas, has demanded of the plaintiffs herein and the said St. Louis & San Francisco Railroad Company, the payment to said defendant, of the sum of Two Thousand Five Hundred ($2,500.00) Dollars, as a corporation tax on a sum of more than Five Million ($5,000,000.00) Dollars of the capital stock of the said St. Louis & San Francisco Railroad Company so issued and
9f outstanding and invested and used as herein stated. The defendant has determined from the report filed by the plaintiffs herein and the said St. Louis & San Francisco Railroad Company in his office, that the proportion of the issued capital stock of the said St. Louis & San Francisco Railroad Company represented by its property and business in the State of Kansas is more than Five Million ($5,000,000.00) Dollars. That the plaintiffs herein, protesting that the said demand of the said defendant for the payment of said sum as such corporation tax and fee was illegal and unauthorized, did, on the 31st day of March, A. D. 1914, pay to said defendant, under protest, and through coercion and duress and against their will, the said sum of Two Thousand Five Hundred ($2,500) Dollars, which sum was received, and is now retained by said defendant. The defendant herein, at the time he demanded the payment of said sum, and at the time he received the payment of said sum, was without any authority of law or legal right so to do, and these plaintiffs under the fear that in case they refused to pay said sum, they and the said St. Louis & San Francisco Railroad Company would be subjected to extended litigation and put to much expense, and if the law hereinafter referred to should perchance be held to be valid, plaintiffs herein and said St. Louis & San Francisco Railroad Company might be subjected to the severe penalties described in the law hereinafter referred to, and deprived of the right to do business in the State of Kansas.

9g Plaintiffs allege that not more than one-fourth (¼) of the issued capital stock of St. Louis & San Francisco Railroad Company is now or has been during the time hereinbefore referred to, devoted to business in Kansas or invested in its property in Kansas, but that three-fourths of its capital stock has been invested and is now invested in railroad lines and property connected therewith situated outside of the State of Kansas.

Plaintiffs allege that the defendant herein demanded of the plaintiffs herein and of the said St. Louis & San Francisco Railroad Company, the said sum of money hereinbefore referred to, under the claim and pretense on the part of the defendant that the provisions of Chapter 135 of the Session Laws of the State of Kansas enacted by the Legislature of said state at its session in the year 1913, authorized and empowered the defendant to demand and receive of the plaintiffs herein and the said St. Louis & San Francisco Railroad Company, said sum of Two Thousand Five Hundred ($2,500.00) Dollars, and the said defendant claimed and insisted that the plaintiffs herein and the said St. Louis & San Francisco Railroad Com-

pany were legally obligated under the provisions of said law to pay said sum as a tax or fee upon that portion of the capital stock of the said St. Louis & San Francisco Railroad Company devoted to business in Kansas.

Plaintiffs allege that said Chapter 135 of the Session Laws of the State of Kansas of 1913, attempts to require from every
9h corporation organized and existing under and by virtue of the laws of the State of Kansas, an annual fee upon the amount of its paid up capital stock, which amount is governed by the amount of such paid up capital stock, and said law requires or attempts to require the payment of said fee upon the capital stock of all corporations organized and existing under and by virtue of the laws of the State of Kansas, regardless of whether or not said capital stock is used or devoted to business in the State of Kansas, and regardless of the fact whether or not said capital stock is used and devoted in or to or invested in property situated in the State of Kansas, and other states by and with which said corporations carry on the business of interstate commerce.

Plaintiffs allege that the provisions of said Chapter 135 of the Session Laws of the State of Kansas, 1913, are invalid, and did not authorize the defendant herein to demand and receive of the plaintiffs herein, or from the said St. Louis & San Francisco Railroad Company, the aforesaid sum of money for the aforesaid purpose. That the provisions of said Chapter 135 of the Laws of 1913 of the State of Kansas are in conflict with and are repugnant to that provision of Section 10, of Article I, of the Constitution of the United States, which provides that Congress shall have power "To regulate commerce with foreign nations and among the several states and with the Indian tribes."

Plaintiffs allege that the Congress of the United States has enacted laws regulating commerce between the several states
9i of the union and between states above named, into and through which the lines of railroad of the said St. Louis & San Francisco Railroad Company now controlled and operated by the plaintiffs herein, extend.

Plaintiffs allege that there are now and have been at all times herein stated, many railroad corporations which have been organized and are now existing under and by virtue of the laws of the State of Kansas with large amounts of capital stock which has been issued and which are now and during all of said times have been outstanding and invested in lines of railroad extending through the State of Kansas and through other states in the United States, by means of which and over which, the said railroad companies so organized carry on the business of common carriers engaged in interstate commerce. That the said corporation fee or tax which it is provided by said Chapter 135 of the Session Laws of 1913, said corporation shall pay to the Secretary of State on their issued and paid up capital stock imposes a burden upon interstate commerce, and is invalid and in conflict with the provisions of the Constitution of the United States above referred to.

Plaintiffs allege that the law contained in said Chapter 135 of

the Session Laws of 1913, being invalid and not enforcible against railroad corporations and other corporations organized and existing under the laws of the State of Kansas, and whose capital stock
9*j* is devoted to carrying on commerce among the several states, said law is also invalid and inoperative as to foreign corporations, and the defendant herein had no legal authority to demand and receive from the plaintiffs herein and the said St. Louis & San Francisco Railroad Company, said sum of Two Thousand Five Hundred ($2,500.00) Dollars as a payment of the corporation tax on a portion of the capital stock of said railroad company. That the complying with the provisions of Chapter 186 of the Laws of Kansas of 1887, by the said St. Louis & San Francisco Railroad Company, as hereinbefore stated, and the acquiring property in the State of Kansas, relying upon the provisions of said law, created a contract between the State of Kansas and the said St. Louis & San Francisco Railroad Company that the State of Kansas would not subject the said St. Louis & San Francisco Railroad Company and the plaintiffs herein, to any greater or different liabilities than those imposed upon railroad corporations organized and existing under and by virtue of the laws of the State of Kansas. That the law contained in Section 135 of the Session Laws of 1913 of the State of Kansas, if enforced, would impair the obligation of said contract and be in violation of that part of Section 12, Article I, of the Constitution of the United States which provides:

"No state shall * * * pass any bill of attainder, ex post facto law or law impairing the obligation of contracts."

9*k* Plaintiffs allege that said law is also in conflict with that part of the fourteenth amendment to the Constittuion of the United States, which provides:

"Nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction equal protection of the laws."

Plaintiffs allege that said law, if enforced, would impose upon the plaintiffs herein and upon the St. Louis & San Francisco Railroad Company a burden and obligation which said law does not impose upon railroad companies organized and existing under the laws of the State of Kansas, owning railroads over which and by means of which interstate commerce is carried on.

Plaintiffs state that there is now due them from the defendant, on account of the foregoing premises, the sum of Two Thousand Five Hundred ($2,500.00) Dollars with interest thereon at the rate of six per cent per annum from and after the 31st day of March, 1914.

Wherefore, plaintiffs pray judgment against the defendant for the sum of Two Thousand Five Hundred ($2,500.00) Dollars with interest thereon at the rate of six per cent per annum from and after the 31st day of March, A. D. 1914, and the costs of this suit.

Thereafter, in due time, the defendant duly filed his demurrer to said amended petition, which demurrer, omitting caption, signature of counsel, endorsements and filing marks, was as follows:

9l

Demurrer.

Now comes the defendant herein and demurs to the plaintiffs' amended petition, for the reason that said amended petition does not state facts sufficient to constitute a cause of action.

Thereafter said demurrer was submitted to and was heard by the court below and was by the court sustained and judgment rendered thereon in said case as follows:

Journal Entry.

Now, on this ninth day of May, A. D. 1914, the above entitled action comes on for hearing upon the demurrer heretofore filed by said defendant to the amended petition of the plaintiffs in this action, and the plaintiffs appear by W. F. Evans, R. R. Vermilion and W. F. Lilleston, their attorneys; and the defendant appears by J. S. Dawson, W. P. Montgomery and F. P. Lindsay, his attorneys, and said demurrer is submitted to the court and the same taken under advisement; and on this sixteenth day of May, A. D. 1914, the court being fully advised in the premises, orders and adjudges that the said demurrer of the said defendant be and the same is hereby sustained, to which judgment and ruling the plaintiffs except; whereupon the plaintiffs decline to plead further and elect to stand upon their amended petition.

9m It is therefore considered, ordered and adjudged by the court that the plaintiffs take nothing by this action and that the defendant have and recover of and from the plaintiffs the costs of this action taxed at $—, to which judgment plaintiffs except.

Notice of appeal of this case by plaintiffs to the Supreme Court of Kansas, was duly filed and copy thereof served, service duly acknowledged and proved, proof filed and appeal perfected within due time.

I, the undersigned attorney for appellants named in the foregoing abstract, do hereby certify that the foregoing is a true and complete abstract of the record in the case therein named.

R. R. VERMILION,
Attorney for Appellants.

Cost of Abstract $7.50.
Paid by appellants.

10 And afterwards, on the 14th day of January, 1915, the same being one of the regular judicial days of the January term, 1915, of the Supreme Court of the State of Kansas, before said Court in session at the Supreme Court Room in the City of Topeka, the following proceeding, among others, was had, and remains of record in words and figures as follows, to-wit:

11 In the Supreme Court of the State of Kansas, Thursday, January 14, 1915.

JAMES W. LUSK et al., etc., Appellants,
vs.
CHARLES H. SESSIONS, as Sec. of State, Appellee.

Journal Entry of Substitution.

Now, on this 14th day of January, 1915, it appearing to the court upon suggestion of the appellants in the two actions first above mentioned and the defendants, The Chicago, Rock Island and Pacific Railway Company, Chicago, Burlington and Quincy Railroad Company, and Kansas City Southern Railway Company, in the action last above mentioned, that on January 11th 1915, Charles H. Sessions as Secretary of State of the State of Kansas, was succeeded by J. T. Botkin, who was duly elected and has duly qualified in said office, and that John S. Dawson, as Attorney General of the State of Kansas, has been succeeded by S. M. Brewster, who was duly elected and has duly qualified in said office, and upon application and motion made in open court, and upon consent duly obtained,

It is ordered that said actions be, and the same are revived in the names of J. T. Botkin as Secretary of State of the State of Kansas, to be substituted in the place of Charles H. Sessions, and S. M. Brewster as Attorney General of the State of Kansas, to be substituted in the place of John S. Dawson, and that said respective suits proceed accordingly.

12 And afterwards, on the 4th day of March, 1915, the same being one of the regular judicial days of the January term, 1915, of the Supreme Court of the State of Kansas, before said Court in session at the Supreme Court room in the City of Topeka, the following proceeding, among others, was had and remains of record in words and figures as follows, to-wit:

13 In the Supreme Court of he State of Kansas, Thursday, March 4, 1915.

No. 19559.

JAMES E. LUSK et al., Appellants,
vs.
CHARLES H. SESSIONS, etc., Appellee.

Journal Entry of Submission.

This cause comes on to be heard on the notices of appeal, transcript of the judgment and abstract of the record of Division No. One, of the district court of Shawnee County; thereupon after oral argu-

ment by R. R. Vermilion for the appellant, and by S. M. Brewster, Attorney General, for the appellee, said cause is submitted on brief of counsel for both parties, and taken under advisement by the court.

14 And afterwards on the 10th day of April, 1915, the same being one of the regular judicial days of the January Term, 1915, of the Supreme Court of the State of Kansas, before said Court in session at the Supreme Court Room in the City of Topeka, the following proceeding among others, was had and remains of record in words and figures as follows, to-wit:

15 In the Supreme Court of the State of Kansas, Saturday, April 10th, 1915.

No. 19559.

JAMES W. LUSK et al., Receivers, etc., Appellants,
vs.
CHARLES H. SESSIONS, Sec. of State, Appellee.

Journal Entry of Judgment.

This cause comes on for decision, and thereupon it is ordered and adjudged that the judgment of the court below be affirmed. It is further ordered that the appellant pay the costs of this case in this court taxed at $—, and hereof let execution issue.

16 Be it further remembered, that on the same day, to-wit: the 10th day of April, 1915, there was filed in the office of the Clerk of the Supreme Court of the State of Kansas, the Court's written opinion, together with the syllabus thereto, which opinion and syllabus are in words and figures as follows, to-wit:

17

No. 19559.

JAMES W. LUSK et al., as Receivers, etc., Appellants,
v.
CHARLES H. SESSIONS, as Secretary of State, etc., Appellee.

Appeal from Shawnee County (Division No. 1).

Affirmed.

Syllabus by the Court.

MASON, *J.*:

The rule in the preceding case followed with respect to the tax on a foreign corporation entitled to privileges equal to those granted to domestic corporations.

All the Justices concurring except Dawson, J., who did not sit.

18 The opinion of the court was delivered by

MASON, J.: The receivers of the St. Louis & San Francisco Railroad Company paid under protest the tax required by the terms of the corporation tax law of 1913 (Laws 1913, ch. 1351), and sued to recover the amount. A demurrer to the petition was sustained, and the plaintiff appeals.

The company named is a foreign corporation which has complied with certain conditions entitling it under our statutes to the same treatment as domestic corporations. The argument is made that if the tax law referred to is unconstitutional, and can not be enforced against domestic corporations, the Frisco company is entitled to the same exemption by virtue of the guaranty of privileges equal to those of corporations chartered by this state. We have decided that the act in question is valid as to domestic corporations, and this conclusion necessarily disposes of the contentions made in this case.

The judgment is affirmed.

All the justices concurring except Dawson, J., who did not sit.

19 And afterwards, on the 20th day of April, 1915, there was filed in the office of the clerk of the Supreme Court of the State of Kansas, a written stipulation and agreement signed by counsel for both parties setting forth the portions of the record to be incorporated in the certified transcript. Stipulation and agreement is in the words and figures as follows, to-wit:

20 In the Supreme Court of the State of Kansas.

No. 19559.

JAMES W. LUSK, WILLIAM C. NIXON, and WILLIAM B. BIDDLE, Receivers of the Railroads and Property of St. Louis and San Francisco Railroad Company, Appellants,

vs.

J. T. BOTKIN, Secretary of State of the State of Kansas, Successor in Office to Charles H. Sessions, Secretary of State of the State of Kansas, and Substituted by an Order of Revivor as Appellee in the Stead of the Said Charles H. Sessions, Secretary of State, Appellee.

Stipulation.

It Is Hereby Stipulated and Agreed by and between the parties hereto, through S. M. Brewster, Attorney General of the State of Kansas, and attorney of record for J. T. Botkin, Secretary of State of the State of Kansas, defendant in error, and R. R. Vermilion and W. F. Lilleston, attorneys for James W. Lusk, William C. Nixon and William B. Biddle, Receivers of the Railroads and Property of St. Louis and San Francisco Railroad Company, plaintiffs in error, that the Clerk of the Supreme Court of the State of Kansas, in preparing a transcript of the record in the above entitled case, to be transmitted to the Supreme Court of the United States, with the

writ of error heretofore, on April 14, 1915, allowed and issued from the said Supreme Court of the United States, to the Supreme Court of the State of Kansas, in said case, may and shall incorporate in such transcript and transmit with said writ of error, the following portions of the record, which shall constitute the transcript of record on error herein, for the review of this case in the Supreme Court of the United States.

21 First. Appellants' abstract of record complete, including amended petition, demurrer, journal entry of proceedings and judgment.

Second. This stipulation with endorsements and filing marks.

Third. Copy of the journal entry of submission of the case in the Supreme Court of Kansas.

Fourth. Copy of the opinion and of the final judgment made and entered in said case, in the Supreme Court of Kansas.

Fifth. The certificate of the Clerk of the Supreme Court of Kansas that the foregoing is a full, true and complete transcript of the record and proceedings.

Sixth. 1. All papers and files in and concerning the proceedings in error for the review of this case by the Supreme Court of the United States, including copy of petition for writ of error, allowance, endorsements and filing marks; copy of assignment of errors, endorsements and filing marks, copy of order of Chief Justice granting petition for writ of error, endorsements and filing marks; copy of bond with approval endorsed, endorsements and filing marks, together with Clerk's certificate of lodgment of the original bond in his office; original writ of error, allowance, endorsements and filing marks, together with Clerk's certificate of lodgment of the same and of copy thereof for defendant in error in his office; original citation, endorsements and filing marks, together with acknowledgments of service and entry of appearance.

2. Return of writ of error, together with statement of costs.

Seventh. **Order of Revivor.**

Eighth. Notice of Appeal and Proof of Service.

The Clerk will also index the record so to be transmitted.

22 It is stipulated and understood by and between the parties hereto that the above and foregoing portions of the record in this case are sufficient for the consideration of the questions to be reviewed in the Supreme Court of the United States and that the omitted portions are unnecessary to such consideration of said questions, and it is further stipulated and understood by and between the parties that the appeal of this case was properly taken to and perfected in the Supreme Court of the State of Kansas, and that on said appeal, the term of office of Charles H. Sessions, Secretary of State of the State of Kansas, expired, and he was succeeded in office by the appellee, J. T. Botkin, the Secretary of State of the State of Kansas, who was by order of revivor of the Supreme Court of Kansas, duly substituted as appellee in said case instead of said Charles H. Sessions, former Secretary of State, and said action was duly revived against and in the name of said J. T. Botkin, Secretary of State of the State of Kansas, as appellee, and that said appeal

resulted in the final judgment and decision complained of by James W. Lusk, William C. Nixon, and William B. Biddle, Receivers of the Railroads and Property of St. Louis and San Francisco Railroad Company, plaintiffs in error, in said proceedings in error for the review of this case in and by the Supreme Court of the United States.

Dated this 20th day of April, 1915.

S. M. BREWSTER,
Attorney General of the State of Kansas and Attorney of Record for J. T. Botkin, Secretary of State of the State of Kansas, Defendant in Error.

R. R. VERMILION &
W. F. LILLESTON,
Attorneys for James W. Lusk, William C. Nixon and William B. Biddle, Receivers of the Railroads and Property of St. Louis and San Francisco Railroad Company, Plaintiffs in Error.

(Endorsed:) In the Supreme Court of the State of Kansas, No. 19,559. James W. Lusk et al., Appellants, vs. J. T. Botkin, etc., Appellee. Stipulation. Filed Apr- 20, 1915. D. A. Valentine, Clerk Supreme Court.

[Endorsed:] 19559. In the Supreme Court of the State of Kansas. James W. Lusk, et al., Appellants, vs. J. T. Botkin, etc., Appellees. Stipulation. Filed April 20, 1915. D. A. Valentine, Clerk Supreme Court.

23 SUPREME COURT,
State of Kansas, ss:

I, D. A. Valentine, Clerk of said court do hereby certify that the above and foregoing is a true, full, complete and correct transcript of the record and proceedings in the above entitled case, and also of the opinion of the court rendered therein as the same now appears of record, and remains on file in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said court at my office in Topeka, Kansas, this 27th day of April, 1915.

[Seal Supreme Court, State of Kansas.]

D. A. VALENTINE,
Clerk Supreme Court of Kansas.

24 Here follows:

The Original Petition for a Writ of Error and the allowance thereof.

The Original Assignments of Error.

A copy of the Bond for Appeal.

The Original Writ of Error and the Original Citation, with Proof of Service thereof.

25 In the Supreme Court of the State of Kansas.

No. 19559.

JAMES W. LUSK, WILLIAM C. NIXON and WILLIAM B. BIDDLE, Receivers of the Railroads and Property of St. Louis and San Francisco Railroad Company, Appellants,

vs.

J. T. BOTKIN, Secretary of State of the State of Kansas, Successor in Office of Charles H. Sessions, Secretary of State of the State of Kansas, and Substituted by an Order of Revivor as Appellee in the Stead of the said Charles H. Sessions, Secretary of State, Appellee.

UNITED STATES OF AMERICA,
State of Kansas:

Petition for Writ of Error.

To the Honorable W. A. Johnston, Chief Justice of the Supreme Court of the State of Kansas:

Your petitioners, James W. Lusk, William C. Nixon and William B. Biddle, Receivers of the Railroads and Property of St. Louis and San Francisco Railroad Company, a corporation, organized under the laws of the State of Missouri, respectfully show that on the 10th day of April, 1915, the Supreme Court of the State of Kansas, in the above entitled case pending in said court, wherein J. T. Botkin, Secretary of State of the State of Kansas, was appellee and your petitioners, James W. Lusk, William C. Nixon and William B. Biddle, Receivers of the Railroads and Property of St. Louis & San Francisco Railroad Company, were appellants, made and entered a final judgment and decision in favor of said appellee and against the appellants, your petitioners; that this case was originally brought by said appellants, as plaintiffs, in the District Court of Shawnee County, Kansas, against Charles H. Sessions, Secretary of

26 State of the State of Kansas, as defendant, who filed in said District Court a general demurrer to said plaintiff's petition therein, which general demurrer was by the consideration and judgment of said District Court sustained, and judgment was rendered by said District Court that said demurrer be sustained and that the plaintiffs in said court, your petitioners herein, take nothing by said action and that they pay the costs of said suit. That an appeal from the said judgment of said District Court, to the Supreme Court of the State of Kansas, was duly taken and perfected by the plaintiffs therein, these appellants, your petitioners, and during the pendency of said suit and said appeal, in the said Supreme Court of the State of Kansas, the term of office of the said Charles H. Sessions, Secretary of State of the State of Kansas, expired and he was succeeded in office by the appellee, J. T. Botkin, as Secretary of State of the State of Kansas, who was by the order and judgment of the Supreme Court of the State of Kansas, duly substituted as appellee instead of the said Charles H. Sessions, former Secretary

of State, and said action was revived against and in the name of the said J. T. Botkin, Secretary of State of the State of Kansas; that said final judgment and decision of the Supreme Court of the State of Kansas, in said case, affirmed said judgment of the District Court of Shawnee County, Kansas, as will particularly appear from the record in this case. That in said final judgment and decision, as well as in the proceedings had prior thereto in said case, certain manifest errors were committed to the prejudice of your petitioners, who feel themselves aggrieved by said final decision and judgment, all of which will more particularly appear from the assignment of errors filed with this petition. That said Supreme Court of the State of Kansas is the highest court of the State of Kansas in which a decision in said case and matter could be had, and is the highest court and the court of last resort in said State of Kansas.

That in said case and in the Supreme Court of the State of Kansas, your petitioners duly drew in question the validity of Chapter
27 135 of the Session Laws of the State of Kansas of 1913, the same being an act of the legislature of the State of Kansas, entitled, "An Act to Require Corporations to File Annual Reports with the Secretary of State and to Pay Certain Annual Fees, and Repealing Section 1726 General Statutes of Kansas 1909." And your petitioners also duly and particularly drew in question in said case, the validity of said statute and its provisions, insofar as it or they applied to St. Louis & San Francisco Railroad Compony or to corporations organized under the laws of other states than Kansas, and more particularly railroad corporations which were organized under the laws of other states than Kansas and which fully complied with Chapter 186 of the Session Laws of Kansas of 1887 and which extended their railroad lines and business from other states into Kansas, in pursuance of said Chapter 186 of the Session Laws of Kansas, 1887, on the ground that said statute and said provisions, and each of them, were repugnant to that portion of the Constitution of the United States which provides that Congress shall have power to regulate commerce with foreign nations and among the several states and with the Indian tribes, and on the ground that the same constituted an unconstitutional burden on interstate commerce, and on the ground that the same, and each of them, were repugnant to the Fourteenth Amendment to the Constitution of the United States, which provides, "Nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws," and on the ground that the same was in violation of that part of Section 10, Article I, of the Constitution of
28 the United States which provides, "No state shall * * * pass any bill of attainder, ex post facto law or law impairing the obligation of contracts."

That said final decision and judgment of the Supreme Court of the State of Kansas was in favor of the validity of said statute of Kansas and the said provisions thereof with reference to St. Louis & San Francisco Railroad Company and to corporations organized under the laws of other states than Kansas, and more particularly

railroad corporations which were organized under the laws of other states than Kansas and which complied with Chapter 186 of the Session Laws of Kansas of 1887 and which extended their railroad lines and business from other states into Kansas, in pursuance of said Chapter 186 of the Session Laws of Kansas of 1887. That in said case and in the Supreme Court of the State of Kansas, your petitioners claimed that said statute and said provisions, and each of them, constituted and constitute a burden on interstate commerce and an attempt to regulate commerce among the several states of the United States, and deprived your petitioners of liberty and property without due process of law and denied to your petitioners the equal protection of the laws, contrary to the Fourteenth Amendment to the Constitution of the United States, and impaired the obligations of the contract made between the State of Kansas and the St. Louis & San Francisco Railroad Company, under Chapter 186 of the Session Laws of Kansas of 1887, with which said St. Louis & San Francisco Railroad Company fully complied, and in pursuance of which it extended and operated its line of railroad into Kansas and said final judgment and decision of the
29 Supreme Court of the State of Kansas was against your petitioners' said claims, and each of them, and was against rights, privileges and immunities claimed by your petitioners in and throughout said case and in the Supreme Court of the State of Kansas, under Section 8 and Section 10, and each of them, of Article I., of the Constitution of the United States; all of which will more particularly appear from the record and proceedings in said case. Your petitioners further represent that said final decision and judgment of the Supreme Court of Kansas was and is erroneous and contrary to Section 8 of Article I. of the Constitution of the United States and the Fourteenth Amendment to the Constitution of the United States, and each of them.

Wherefore, Your petitioners, James W. Lusk, William C. Nixon and William B. Biddle, Receivers of the Railroads and Property of St. Louis & San Francisco Railroad Company, pray for the allowance of a Writ of Error from the Supreme Court of the United States to the Supreme Court of the State of Kansas, and the Judges thereof, to the end that the record in this case and matter may be removed into the Supreme Court of the United States and each and all of the errors complained of by your petitioners be examined and corrected and said judgment reversed; and for citation, stay and supersedeas, and for such other processes and relief as will enable your petitioners to obtain a review of this case in, and a correction of said errors, and each of them, by, the Supreme Court of the United States, and your petitioners will ever pray.

JAMES W. LUSK,
WILLIAM C. NIXON AND
WILLIAM B. BIDDLE,
Receivers of the Railroads and Property of
St. Louis & San Francisco Railroad Company,
By R. R. VERMILION,
W. F. LILLESTON,
Attorneys for said Petitioners.

Allowed at Topeka, Kansas, this April 14, 1915.
W. A. JOHNSTON,
Chief Justice of the Supreme Court of the State of Kansas.

[Endorsed:] In the Supreme Court of the State of Kansas. No. 19559. James W. Lusk, et al., Receivers, Appellants, vs. J. T. Botkin, Secretary of State of the State of Kansas. Petition for Writ of Error. Filed Apr- 14, 1915. D. A. Valentine, Clerk Supreme Court.

30 In the Supreme Court of the State of Kansas.

No. 19559.

JAMES W. LUSK, WILLIAM C. NIXON and WILLIAM B. BIDDLE, Receivers of the Railroads and Property of St. Louis and San Francisco Railroad Company, Appellants,

vs.

J. T. BOTKIN, Secretary of State of the State of Kansas, Successor in Office to Charles H. Sessions, Secretary of State, etc., Appellee.

Assignment of Errors.

Come now James W. Lusk, William C. Nixon and William B. Biddle, Receivers of the Railroads and Property of St. Louis and San Francisco Railroad Company, the appellants named in the above entitled action, and file herein the following assignment of errors which they will present to the Supreme Court of the United States, and upon which they will rely in their prosecution of the Writ of Error issued or to be issued in this case, from the Supreme Court of the United States to the Supreme Court of Kansas, and they aver that the Supreme Court of the State of Kansas, being the highest court of law or equity of the State of Kansas in which a decision could be had in said suit, on the 10th day of April, 1915, rendered a final judgment in the above entitled action, which was duly entered of record, affirming the judgment of the District Court of
31 Shawnee County, Kansas, in favor of the defendant and against plaintiffs, sustaining the general demurrer filed by the defendant in the District Court of Shawnee County, Kansas, to the amended petition of the plaintiffs, these appellants, and for costs, all as shown by the record in this case.

In the rendition of said judgment by said Supreme Court of the State of Kansas, the following adverse and manifest errors were committed by the Supreme Court of the State of Kansas, to the great damage and prejudice of these appellants, which are apparent on the face of the record, and for the purpose of having the same reviewed and said final judgment reversed and corrected in and by the Supreme Court of the United States, said appellant James W. Lusk, William C. Nixon and William B. Biddle, Receivers of the Railroads

and Property of St. Louis and San Francisco Railroad Company, make the following assignment of errors:

1. The Supreme Court of the State of Kansas erred in rendering said final judgment affirming the judgment of the District Court of Shawnee County, Kansas, in favor of the defendant and against the plaintiffs in that court, sustaining the general demurrer filed by the defendant in the District Court of Shawnee County, Kansas, to the amended petition of the plaintiffs, these appellants, and for costs.

2. The said Supreme Court of the State of Kansas erred in holding and adjudging that the judgment rendered by the District Court of Shawnee County, Kansas, in favor of the defendant and against the plaintiffs, in said court, sustaining the general demurrer filed by the defendant in said District Court of Shawnee County,
32 Kansas, to the amended petition of the plaintiffs, these appellants, and for costs was a valid and legal judgment.

3. Said Supreme Court of the State of Kansas erred in holding and adjudging that the amended petition of the plaintiffs, these appellants, filed by them in the District Court of Shawnee County, Kansas, in said case, did not state facts sufficient to constitute a cause of action.

4. Said Supreme Court of the State of Kansas erred in holding and adjudging that Chapter 135 of the Session Laws of the State of Kansas of 1913 constitutes a valid law and is not in conflict with that portion of Article I. of the Constitution of the United States which provides that Congress shall have power to regulate commerce with foreign nations and among the several states and with the Indian tribes.

5. Said Supreme Court of the State of Kansas erred in holding and adjudging that Chapter 135 of the Session Laws of the State of Kansas of 1913 constitutes a valid law and is not in conflict with that portion of Article I. of the Constitution of the United States which provides, "No state shall * * * pass any bill of attainder, ex post facto law or law impairing the obligation of contracts."

6. Said Supreme Court of the State of Kansas erred in holding and adjudging that said Chapter 135 of the laws of Kansas of 1913 constitutes a valid law and is not in conflict with that portion of the Fourteenth Amendment to the Constitution of the United States, which provides that "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States nor shall any state deprive any person of life, liberty or
33 property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law."

7. Said Supreme Court of the State of Kansas erred in holding and adjudging that Chapter 135 of the Session Laws of Kansas of 1913, as applied to the capital stock and property of the St. Louis and San Francisco Railroad Company, in charge of and controlled by its Receivers, did not place a burden upon interstate commerce.

8. Said Supreme Court of the State of Kansas erred in holding that Chapter 135 of the Session Laws of Kansas of 1913 was not a burden on or an attempt to regulate commerce among the several states.

9. Said Supreme Court of the State of Kansas erred in holding that Chapter 135 of the Session Laws of Kansas of 1913 did not deprive the appellants, James W. Lusk, William C. Nixon and William B. Biddle, Receivers of the Railroads, and Property of St. Louis and San Francisco Railroad Company, of property, without due process of law.

10. Said Supreme Court of the State of Kansas erred in holding that Chapter 135 of the Session Laws of Kansas of 1913 did not impair the obligation of the contract made between the State of Kansas and St. Louis and San Francisco Railroad Company, under and in pursuance of Chapter 186 of the Session Laws of Kansas of 1887.

11. Said Supreme Court of the State of Kansas erred in holding that Chapter 135 of the Session Laws of Kansas of 1913 did not deprive the St. Louis and San Francisco Railroad Company of property without due process of law.

12. Said Supreme Court of the State of Kansas erred in holding that Chapter 135 of the Session Laws of Kansas of 1913 did not deny to these appellants, James W. Lusk, William C. Nixon
34 and William B. Biddle, Receivers of the Railroads and Property of St. Louis and San Francisco Railroad Company, the equal protection of the laws.

13. Said Supreme Court of the State of Kansas erred in holding that Chapter 135 of the Session Laws of Kansas of 1913 did not deny to St. Louis & San Francisco Railroad Company the equal protection of the laws.

14. Said Supreme Court of the State of Kansas erred in holding and adjudging that those provisions of Chapter 135 of the Session Laws of Kansas of 1913, relating to corporations organized under the laws of other states than Kansas, were not a burden upon, or an attempt to regulate, the commerce in which these appellants were and are engaged among the several states.

Wherefore, as well for the foregoing as for other plain errors apparent on the face of the record, these appellants, James W. Lusk, William C. Nixon and William B. Biddle, Receivers of the Railroads and Property of St. Louis and San Francisco Railroad Company, pray that the said errors, and each of them, be corrected by the Supreme Court of the United States, and that said judgment so rendered by the Supreme Court of the State of Kansas, in which it affirmed the judgment of the District Court of Shawnee County, Kansas, be reversed and set aside and held for naught, and for costs and such other and further relief as it may be entitled to in the premises.

R. R. VERMILION,
W. F. LILLESTON,
Attorneys for Appellants James W. Lusk, William C. Nixon and William B. Biddle, Receivers of the Railroads and Property of St. Louis and San Francisco Railroad Company.

[Endorsed:] In the Supreme Court of the State of Kansas. No. 19559. James W. Lusk, et al., Appellants, vs. J. T. Botkin, etc., Appellee. Assignment of Errors. Filed Apr- 14, 1915. D. A. Valentine, Clerk Supreme Court.

35

Copy.

In the Supreme Court of the State of Kansas.

No. 19559.

JAMES W. LUSK, WILLIAM C. NIXON, and WILLIAM B. BIDDLE, Receivers of the Railroads and Property of St. Louis and San Francisco Railroad Company, Appellants,

vs.

J. T. BOTKIN, Secretary of State of the State of Kansas, Successor in Office to Charles H. Sessions, Secretary of State, etc., Appellee.

Bond.

Know All Men by These Presents that we, James W. Lusk, William C. Nixon and William B. Biddle, Receivers of the Railroads and Property of St. Louis and San Francisco Railroad Company, as principals, and United States Fidelity & Guaranty Company, as surety, are held and firmly bound unto said J. T. Botkin, Secretary of State of the State of Kansas, in the sum of Five Hundred Dollars, to be paid to said J. T. Botkin, Secretary of State of the State of Kansas, to the payment of which well and truly to be made, we bind ourselves, our successors, trustees and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this April 13, 1915.

Whereas the above named appellants James W. Lusk, William C. Nixon and William B. Biddle, Receivers of the Railroads and Property of St. Louis and San Francisco Railroad Company, have prosecuted a Writ of Error in the Supreme Court of the
36 United States to reverse the judgment rendered in the above entitled action, by the Supreme Court of the State of Kansas.

Now, Therefore, the condition of this obligation and bond is such that if the above named appellants, James W. Lusk, William C. Nixon and William B. Biddle, Receivers of the Railroads and Property of St. Louis and San Francisco Railroad Company, shall prosecute their said Writ of Error to effect and answer all costs and damages, if they shall fail to make their plea good, then this obligation to be void, otherwise to remain in full force and effect.

JAMES W. LUSK,
WILLIAM C. NIXON, AND
WILLIAM B. BIDDLE,
Receivers of the Railroads and Property of St. Louis and San Francisco Railroad Company, Principals.
By R. R. VERMILION,
Their Duly Authorized Agent and Attorney.
UNITED STATES FIDELITY & GUARANTY COMPANY, *Surety,*
By ——,
Its Duly Authorized Agent and Attorney in Fact. [SEAL.]

The above bond is hereby approved, this April 14, 1915.

Chief Justice of the Supreme Court of the State of Kansas.

Attest:

[SEAL.] D. A. VALENTINE,
Clerk of the Supreme Court of the State of Kansas.

[Endorsed] In the Supreme Court of Kansas. James W. Lusk, et al., Appellants, v. J. T. Botkin, Sec. of State, etc., Appellee. Bond. Filed Apr- 14, 1915. D. A. Valentine, Clerk Supreme Court.

37 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the Supreme Court of the State of Kansas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of Kansas, before you, being the highest court of law and equity of the said state in which a decision could be had in said suit between James W. Lusk, William C. Nixon and William B. Biddle, Receivers of the Railroads and Property of St. Louis and San Francisco Railroad Company, and J. T. Botkin, Secretary of State of the State of Kansas, wherein was drawn in question the validity of a statute of said State of Kansas on the ground that said statute was repugnant to the Constitution of the United States and more particularly to that portion of Article I. of the Constitution of the United States which provides that "Congress shall have power to regulate commerce with foreign nations and among the several states and with the Indian tribes," and mort particularly to the Fourteenth Amendment to said Constitution of the United States, which provides, "Nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws," and more particularly to Section 10 of Article I. of the Constitution of the United States which provides, "No state shall * * * pass any bill of attainder, ex post facto law or law impairing the obligation of contracts;" and the decision was in favor of the validity of said state statute; and wherein was drawn in question the construction of a clause of the Constitution of the United States, and more particularly Section 1 of the Fourteenth Amendment to the Constitution of the United States, and more particularly the above quoted portions of Article I. of the Constitution of the United States, being Sections 8 and 10 thereof, and the decision was against the right, privilege and immunity specially set up and claimed by said James W. Lusk,
38 William C. Nixon and William B. Biddle, Receivers of the Railroads and Property of St. Louis and San Francisco Railroad Company; a manifest error hath happened to the great damage of the said James W. Lusk, William C. Nixon and William B. Biddle, Receivers of the Railroads and Property of St. Louis and

San Francisco Railroad Company, as by their complaint appears. We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid, in this behalf do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same in the said Supreme Court of the United States at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, this 14th day of April in the year of our Lord One Thousand Nine Hundred and Fifteen.

[Seal of District Court U. S., District of Kansas, 1851.]

MORTON ALBOUGH,
Clerk of the District Court of the United States for the District of Kansas, First Division.

Allowed at Topeka, Kansas, on this April 14, 1915.

W. A. JOHNSTON,
Chief Justice of the Supreme Court of the State of Kansas.

[Endorsed:] In the Supreme Court of the State of Kansas, No. 19559. James W. Lusk, et al., Appellants, vs. J. T. Botkin, etc., Appellee. Writ of Error. Filed Apr- 14, 1915. D. A. Valentine, Clerk Supreme Court.

39 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to J. T. Botkin, Secretary of State of the State of Kansas, Greetings:

You Are Hereby Cited and Admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C., within thirty days from the date hereof, pursuant to a Writ of Error filed in the office of the Clerk of the Supreme Court of the State of Kansas, wherein James W. Lusk, William C. Nixon and William B. Biddle, Receivers of the Railroads and Property of St. Louis and San Francisco Railroad Company, are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, James W. Lusk, William C. Nixon and William B. Biddle, Receivers of the Railroads and Property of St. Louis and San Francisco Railroad Company, as in said Writ of Error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the Chief Justice of the Supreme Court of the State of Kansas, this 14th day of April, 1915.

W. A. JOHNSTON,
Chief Justice of the Supreme Court of the State of Kansas.

Attest:

[Seal Supreme Court, State of Kansas.

D. A. VALENTINE,
Clerk of the Supreme Court of the State of Kansas.

40 I, J. T. Botkin, Secretary of State of the State of Kansas, defendant in error named in the foregoing citation and the case therein mentioned, hereby acknowledge due and legal service of the above citation upon me, the said defendant in error, and hereby enter appearance in the Supreme Court of the United States, in said case.

Dated at Topeka, Kansas, this April 14, 1915.

[Seal of Secretary of State, State of Kansas.]

J. T. BOTKIN,
Secretary of State of the State of Kansas, Defendant in Error.

I, the undersigned attorney of record for the defendant in error named in the foregoing citation and the case therein mentioned, do hereby acknowledge due and legal service of the foregoing and attached citation upon me and upon said defendant in error, and hereby enter appearance in the Supreme Court of the State of Kansas.

Dated at Topeka, Kansas, this April 14, 1915.

S. M. BREWSTER,
Attorney General of the State of Kansas, Attorney of Record for J. T. Botkin, Secretary of State of the State of Kansas, Defendant in Error.

[Endorsed:] In the Supreme Court of the State of Kansas. James W. Lusk, et al., Appellants, vs. J. T. Botkin, etc., Appellee. Citation. Filed Apr- 14, 1915. D. A. Valentine, Clerk Supreme Court

41 SUPREME COURT,
State of Kansas, ss:

I, D. A. Valentine, Clerk of said court, do hereby certify that there was lodged with me as such clerk on the 14th day of April, 1915, in the above entitled case,

1. The original Bond, of which a copy is herein set forth.
2. Two copies of the Writ of Error, as herein set forth; one for the defendant and one to file in my office.

In Testimony Whereof, I have hereunto set my hand and affixed

the seal of the said court at my office in Topeka, Kansas, this 27th day of April, 1915.

[Seal Supreme Court, State of Kansas.]

D. A. VALENTINE,
Clerk Supreme Court of Kansas.

42 UNITED STATES OF AMERICA.
Supreme Court of Kansas, ss:

In obedience to the commands of the within writ I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, together with all things concerning the same.

In Witness Whereof, I hereunto subscribe my name and affix the seal of said Supreme Court of Kansas, in the City of Topeka, Kansas, this 27th day of April, A. D. 1915.

[Seal Supreme Court, State of Kansas.]

D. A. VALENTINE,
Clerk Supreme Court of Kansas.

Endorsed on cover: File No. 24,703. Kansas Supreme Court. Term No. 451. James W. Lusk, William C. Nixon, and William B. Biddle, receivers of the railroads and property of St. Louis & San Francisco Railroad Company, plaintiffs in error, vs. J. T. Botkin, Secretary of State of the State of Kansas. Filed May 4th, 1915. File No. 24,703.

23

No. 451.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1915.

JAMES W. LUSK, WILLIAM C. NIXON AND WILLIAM B. BIDDLE, RECEIVERS OF THE RAILROADS AND PROPERTY OF ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY, PLAINTIFFS IN ERROR,

VS.

J. T. BOTKIN, SECRETARY OF STATE OF THE STATE OF KANSAS, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

BRIEF OF ARGUMENT OF PLAINTIFFS IN ERROR.

R. R. VERMILION,
Attorney for Plaintiffs in Error.

W. F. EVANS,
Of Counsel.

INDEX.

ALPHABETICAL INDEX OF STATUTES AND CASES.

INDEX (Cont'd.)

No. 451.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1915.

JAMES W. LUSK, WILLIAM C. NIXON AND WILLIAM B. BIDDLE, RECEIVERS OF THE RAILROADS AND PROPERTY OF ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY, PLAINTIFFS IN ERROR,

VS.

J. T. BOTKIN, SECRETARY OF STATE OF THE STATE OF KANSAS, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

STATEMENT OF CASE.

This is a writ of error to the Supreme Court of the State of Kansas, for the purpose of having reviewed the judgment of that court affirming the judgment of the District Court of Shawnee County, Kansas, sustaining a

demurrer to the amended petition of the plaintiffs in that court, plaintiffs in error in this court.

This suit was instituted in the District Court of Shawnee County, Kansas, by the plaintiffs in error against Charles H. Sessions, then Secretary of State of the State of Kansas, to recover the sum of Twenty-five Hundred Dollars paid by plaintiffs in error to the Secretary of State, under protest, as a corporation tax demanded and received under the provisions of Chapter 135 of the Session Laws of Kansas, of 1913.

The amended petition which stated the case of the plaintiffs in that court, plaintiffs in error in this court, is as follows:

> "Comes now the plaintiffs in this action and for their amended petition against the defendant herein state that the defendant is now, and for more than two years last past, has been the duly elected, qualified and acting Secretary of State of the State of Kansas. That the plaintiffs herein are the duly appointed, qualified and acting Secretary of State of Kansas. That the plaintiffs herein are the duly appointed, qualified and acting Receivers of the railroads and property of St. Louis & San Francisco Railroad Company, having been so appointed by the judgment of the District Court of the United States within and for the Eastern Division of the Eastern District of Missouri, and are now in possession and control of all the property of said railroad company. That said St. Louis & San Francisco Railroad Company is now, and was on the 30th day of June, 1896, and ever has been a corporation duly organized and existing under and by virtue of the laws of the State of Missouri, and authorized to

own, construct, acquire by purchase and lease and operate railroads in the State of Missouri, and in the State of Kansas, and other states.

"That on the 30th day of June, 1896, the said St. Louis & San Francisco Railroad Company, being a corporation organized as aforesaid, and for the purpose aforestated, having acquired by purchase and construction certain lines of railroad in the State of Missouri, desired to purchase and acquire and construct certain other and further lines of railroad in the State of Kansas, and to operate the same as a common carrier for hire. That for the purpose of carrying out said purpose and securing authority to own, purchase, lease, construct, maintain and operate a railroad or railroads in the State of Kansas, the said St. Louis & San Francisco Railroad Company, in pursuance of the provisions of Chapter 186 of the Session Laws of the State of Kansas, of 1887, duly filed with the Secretary of State of the State of Kansas, a copy of its charter and Articles of Incorporation, together with a certified copy of a resolution of its Board of Directors, authorizing service of process to be made upon any of its officers or agents in the State of Kansas, engaged in transacting its business in the same manner as might be provided by law for the service of process upon railroad corporations of the State of Kansas; and, said resolution further contained a stipulation that said St. Louis & San Francisco Railroad Company should be and become subject to the provisions of said Chapter 186 of the Session Laws of 1887 of the State of Kansas; and said St. Louis & San Francisco Railroad Company fully complied with all the provisions of said law and became vested with the right and authority to own, by purchase and lease, and to construct, operate and maintain, a railroad or railroad lines in the State of Kansas. That in

pursuance of the provision of said Chapter 186 of the Laws of 1887, of the State of Kansas, and by the authority so obtained by complying with the provisions of said law as hereinbefore stated, and relying upon the same, the said St. Louis & San Francisco Railroad Company did, thereafter purchase a line or railroad extending from the east line of the State of Kansas through the Counties of Cherokee, Labette, Montgomery, Wilson, Greenwood, Butler, Sedgwick, Harvey, Reno, Rice and Ellsworth and constructed certain other lines of railroad in Labette, Crawford, Bourbon and Cowley Counties, in the State of Kansas, and also leased certain other lines of railroad extending through the Counties of Wyandotte, Johnson, Miami, Linn, Bourbon, Crawford and Cherokee, in the State of Kansas. That said St. Louis & San Francisco Railroad Company, relying upon the provisions of said law and the authority to acquire and operate railroads in the State of Kansas through the counties hereinbefore named, and other counties from the 30th day of June, 1896, until the first day of January, A. D. 1913, expended large sums of money in acquiring said above described railroads, and improving the same and building depots, side tracks and other terminal facilities necessary to enable it to operate said railroad in its business as a common carrier. That at the time said St. Louis & San Francisco Railroad Company so purchased, constructed and leased said railroad lines above described, and constructed said depots and side tracks, there was no law in the State of Kansas, that required the said St. Louis & San Francisco Railroad Company to pay an annual corporation tax to the state of Kansas or to the Secretary of State of the State of Kansas, on the capital stock of said railroad com-

pany. That said St. Louis & San Francisco Railroad Company now has, and had at all times herein stated, issued and outstanding and paid up Five Hundred Thousand (500,000) shares of capital stock of the par value of One Hundred ($100.00) Dollars each. That said capital stock was at all of said times and is now invested in and devoted to and used in acquiring the railroad line and lines and other property in the manner hereinbefore described, and in operating the same, which said line and lines of railroad extend from points in the State of Kansas, to and into the States of Missouri, Oklahoma, Texas, Arkansas, Tennessee and other states, and were used and operated at all of said times by said St. Louis & San Francisco Railroad Company, and are now being used and operated by the plaintiffs herein as a railway system over which and by means of which they carry on commerce between the several states above named.

"Plaintiffs state that the defendant herein as Secretary of State of the State of Kansas, has demanded of the plaintiffs herein and the said St. Louis & San Francisco Railroad Company, the payment to said defendant, of the sum of Two Thousand Five Hundred ($2,500.00) Dollars, as a corporation tax on a sum of more than Five Million ($5,000,000.00) Dollars of the capital stock of the said St. Louis & San Francisco Railroad Company so issued and outstanding and invested and used as herein stated. The defendant has determined from the report filed by the plaintiffs herein and the said St. Louis & San Francisco Railroad Company in his office, that the proportion of the issued capital stock of the said St. Louis & San Francisco Railroad Company represented by its property and business in the State of Kansas, is more than Five Million ($5,000,000.00) Dollars. That the plaintiffs herein, protesting that the said demand of the

said defendant for the payment of said sum as such corporation tax and fee was illegal and unauthorized, did, on the 31st day of March, A. D. 1914, pay to said defendant, under protest, and through coercion and duress and against their will, the said sum of Two Thousand Five Hundred ($2,500.00) Dollars, which sum was received, and is now retained by said defendant. The defendant herein, at the time he demanded the payment of said sum, and at the time he received the payment of said sum, was without any authority of law or legal right so to do, and these plaintiffs under the fear that in case they refused to pay said sum, they and the said St. Louis & San Francisco Railroad Company would be subjected to extended litigation and put to much expense, and if the law hereinafter referred to should perchance be held to be valid, plaintiffs herein and said St. Louis & San Francisco Railroad Company might be subjected to the severe penalties described in the law hereinafter referred to, and deprived of the right to do business in the State of Kansas.

"Plaintiffs allege that not more than one-fourth (¼) of the issued capital stock of St. Louis & San Francisco Railroad Company is now or has been during the time hereinbefore referred to, devoted to business in Kansas, or invested in its property in Kansas, but that three-fourths of its capital stock has been invested and is now invested in railroad lines and property connected therewith situated outside of the State of Kansas.

"Plaintiffs allege that the defendant herein demanded of the plaintiffs herein and of the said St. Louis & San Francisco Railroad Company, the said sum of money hereinbefore referred to, under the claim and pretense on the part of the defendant that the provisions of Chapter 135 of the Session Laws of the State of Kansas, enacted by the Legislature of said state at its session in the year 1913,

authorized and empowered the defendant to demand and receive of the plaintiffs herein and the said St. Louis & San Francisco Railroad Company, said sum of Two Thousand Five Hundred ($2,500.00) Dollars, and the said defendant claimed and insisted that the plaintiffs herein and the said St. Louis & San Francisco Railroad Company were legally obligated under the provisions of said law to pay said sum as a tax or fee upon that portion of the capital stock of the said St. Louis & San Francisco Railroad Company, devoted to business in Kansas.

"Plaintiffs allege that said Chapter 135 of the Session Laws of the State of Kansas, of 1913, attempts to require from every corporation organized and existing under and by virtue of the laws of the State of Kansas, an annual fee upon the amount of its paid up capital stock, which amount is governed by the amount of such paid up capital stock, and said law requires or attempts to require the payment of said fee upon the capital stock of all corporations organized and existing under and by virtue of the laws of the State of Kansas, regardless of whether or not said capital stock is used or devoted to business in the State of Kansas, and regardless of the fact whether or not said capital stock is used and devoted in or to or invested in property situated in the State of Kansas, and other states by and with which said corporations carry on the business of interstate commerce.

"Plaintiffs allege that the provisions of said Chapter 135 of the Session Laws of the State of Kansas, 1913, are invalid, and did not authorize the defendant herein to demand and receive of the plaintiffs herein, or from the said St. Louis & San Francisco Railroad Company, the aforesaid sum of money for the aforesaid purpose. That the provisions of said Chapter 135 of the Laws of 1913, of the State of Kansas, are in conflict with and

are repugnant to that provision of Section 10, of Article 1, of the Constitution of the United States, which provides that Congress shall have power 'To regulate commerce with foreign nations and among the several states and with the Indian tribes.'

"Plaintiffs allege that the Congress of the United States, has enacted laws regulating commerce between the several states of the union and between states above named, into and through which the lines of railroad of the said St. Louis & San Francisco Railroad Company now controlled and operated by the plaintiffs herein, extend.

"Plaintiffs allege that there are now and have been at all times herein stated, many railroad corporations which have been organized and are now existing under and by virtue of the laws of the State of Kansas, with large amounts of capital stock which has been issued and which are now and during all of said times have been outstanding and invested in lines of railroad extending through the State of Kansas, with large amounts of capital stock which has been issued and which are now and during all of said times have been outstanding and invested in lines of railroad extending through the State of Kansas, and through other states in the United States, by means of which and over which, the said railroad companies so organized carry on the business of common carriers engaged in interstate commerce. That the said corporation fee or tax which it is provided by said Chapter 135 of the Session Laws of 1913, said corporation shall pay to the Secretary of State on their issued and paid up capital stock imposes a burden upon interstate commerce, and is invalid and in conflict with the provisions of the Constitution of the United States above referred to.

"Plaintiffs allege that the law contained in said Chapter 135 of the Session Laws of 1913, being invalid and not enforcible against railroad cor-

porations and other corporations organized and existing under the laws of the State of Kansas, and whose capital stock is devoted to carrying on commerce among the several states, said law is also invalid and inoperative as to foreign corporations, and the defendant herein had no legal authority to demand and receive from the plaintiffs herein and the said St. Louis & San Francisco Railroad Company, said sum of Two Thousand Five Hundred ($2,500.00) Dollars as a payment of the corporation tax on a portion of the capital stock of said railroad company. That the complying with the provisions of Chapter 186 of the Laws of Kansas, of 1887, by the said St. Louis & San Francisco Railroad Company, as hereinbefore stated, and the acquiring property in the State of Kansas, relying upon the provisions of said law, created a contract between the State of Kansas, and the said St. Louis & San Francisco Railroad Company, that the State of Kansas, would not subject the said St. Louis & San Francisco Railroad Company and the plaintiffs herein, to any greater or different liabilities than those imposed upon railroad corporations organized and existing under and by virtue of the laws of the State of Kansas. That the law contained in Section 135 of the Session Laws of 1913, of the State of Kansas, if enforced, would impair the obligation of said contract and be in violation of that part of Section 12, Article 1, of the Constitution of the United States which provides:

" 'No state shall * * * pass any bill of attainder *ex post facto* law or law impairing the obligation of contracts.'

"Plaintiffs allege that said law is also in conflict with that part of the fourteenth amendment to the Constitution of the United States, which provides:

" 'Nor shall any state deprive any person of life, liberty or property without due process of law,

nor deny to any person within its jurisdiction equal protection of the laws.'

"Plaintiffs allege that said law, if enforced, would impose upon the plaintiffs herein and upon the St. Louis & San Francisco Railroad Company a burden and obligation which said law does not impose upon railroad companies organized and existing under the laws of the State of Kansas, owning railroads over which and by means of which interstate commerce is carried on.

"Plaintiffs state that there is now due them from the defendant, on account of the foregoing premises, the sum of Two Thousand Five Hundred ($2,500.00) Dollars with interest thereon at the rate of six per cent per annum from and after the 31st day of March, 1914.

"Wherefore, plaintiffs pray judgment against the defendant for the sum of Two Thousand Five Hundred ($2,500.00) Dollars with interest thereon at the rate of six per cent per annum from and after the 31st day of March, A. D. 1914, and the costs of this suit. (Record pp. 6, 7, 8.)

To this amended petition the defendant in that court, the Secretary of State, filed his demurrer as follows:

"Now comes the defendant herein and demurs to the plaintiffs' amended petition, for the reason that said amended petition does not state facts sufficient to constitute a cause of action." (Record p. 11.)

The demurrer was argued and submitted to the court and by the court sustained, and the plaintiffs declining to plead further, judgment was rendered for the defendant and against the plaintiffs (Record p. 11).

The case was then taken on appeal to the Supreme

Court of Kansas and there argued and submitted, and on the 4th day of March, 1915, judgment was rendered in that court affirming the judgment of the District Court of Shawnee County (Record p. 13).

A writ of error was sued out of this court, directed to the Supreme Court of Kansas, and the case brought here for review.

The plaintiffs in error are and for more than two years last past have been the duly appointed, qualified and acting receivers of the railroads and property of the St. Louis and San Francisco Railroad Company, the latter being a railroad corporation, organized and existing under and by virtue of the laws of the State of Missouri, with 500,000 shares of capital stock of the par value of $100.00 each, issued and outstanding. In 1896 the St. Louis and San Francisco Railroad Company complied with the laws of the State of Kansas, being Chapter 186 of the Session Laws of 1887 of that State, and became entitled to do business in the State of Kansas under the terms and conditions provided by said act. Said railroad company acquired by purchase, lease and otherwise, railroad property in Kansas, in reliance upon the law under which it was admitted to do business in the state, which railroads in Kansas were connected with railroad lines which it had acquired and owned in the States of Missouri, Oklahoma, Texas, Arkansas, Tennessee and other states, all of which were used and operated as one system at all times, by the said railroad company, and over which and by which the receivers, plaintiffs in error,

were at all the times described in their amended petition, carrying on interstate commerce. The capital stock of said railroad company was used in acquiring the railroads and property described in the amended petition.

The Secretary of State demanded of plaintiffs in error the payment of $2500.00 as a corporation tax on the issued and paid up capital stock of the St. Louis & San Francisco Railroad Company for the year 1913, under the provisions of Chapter 135 of the Session Laws of Kansas of 1913. The plaintiffs in error paid said sum under protest and brought this suit to recover the same.

The act under which said tax was exacted, is as follows:

> "Section 1. Every corporation organized under the laws of this state, for profit, shall make a report in writing to the Secretary of State annually on or before March 31st, showing the condition of the corporation at the close of business on the 31st day of December next preceding the date of filing and in such form as the Secretary of State may prescribe, containing the following facts:
>
> 1. The name of the corporation.
>
> 2. The location of its principal office.
>
> 3. The name of the president, secretary, treasurer and members of the Board of Directors, with postoffice address of each.
>
> 4. The date of the annual election of officers of such corporation.
>
> 5. The amount of authorized capital stock and the par value of each share.

6. The amount of capital stock authorized, the amount of capital stock issued and paid up.

7. The nature and kind of business in which the company is engaged and its place or places of business.

8. A complete and detailed statement of the assets and liabilities of the corporation.

9. A complete list of stockholders with the postoffice address of each and the number of shares held by each.

10. The change or changes, if any, in the above particulars made since the last annual report.

Such report shall be signed and sworn to before an officer duly authorized to administer oaths, by the president or vice president and secretary or general manager of the corporation, and forwarded to the Secretary of State. At the time of filing such annual report it shall be the duty of every corporation, for profit, or for carrying on any kind of business incorporated under the laws of this state to pay to the Secretary of State an annual fee as follows: When the paid up capital stock of the corporation does not exceed ten thousand dollars such annual fee shall be ten dollars; when the paid up capital stock exceeds ten thousand dollars but does not exceed twenty-five thousand dollars, the annual fee shall be twenty-five dollars: when the paid up capital stock exceeds twenty-five thousand dollars but does not exceed fifty thousand dollars the annual fee shall be fifty dollars; when the paid up capital stock exceeds fifty thousand dollars but does not exceed one hundred thousand dollars, the annual fee shall be one hundred dollars; when the paid up capital stock exceeds one hundred thousand dollars, but does not exceed two hundred and fifty thousand dol-

ilars the annual fee shall be one hundred twenty-five dollars; when the paid up capital stock exceeds two hundred and fifty thousand dollars but does not exceed five hundred thousand dollars the annual fee shall be two hundred and fifty dollars; when the paid up capital stock exceeds five hundred thousand dollars but does not exceed one million dollars the annual fee shall be five hundred dollars; when the paid up capital stock exceeds one million dollars but does not exceed two million dollars the annual fee shall be one thousand dollars; when the paid up capital stock exceeds two million dollars but does not exceed three million dollars the annual fee shall be fifteen hundred dollars; when the paid up capital stock exceeds three million dollars but does not exceed five million dollars the annual fee shall be two thousand dollars; when the paid up capital stock exceeds five million dollars, the annual fee shall be two thousand five hundred dollars."

"Sec. 2. Every foreign corporation, for profit, now or hereafter doing business in this state, and owning or using a part or all of its capital in this state, and subject to compliance with the laws relating to the admission of foreign corporations to do business in Kansas, shall make a report in writing to the Secretary of State, annually, on or before March 31st, showing in such form as the Secretaary of State may prescribe, the following facts as of the 31st day of December next preceding the date of filing:

1. The name of the corporation and under the laws of what state or country organized.

2. The location of its principal office.

3. The names of the president, secretary, treasurer, and members of the Board of Directors, with the postoffice address of each.

4. The date of the annual election of officers.

5. The amount of authorized capital stock, and the par value of each share.

6. The amount of capital stock issued, and the amount of capital stock paid up.

7. The nature and kind of business in which the company is engaged and its place or places of business, both within and without the State of Kansas.

8. The name and location of its office or offices in Kansas, and the name and address of the officers or agents of the company in charge of its business in Kansas.

9. The value of the property owned and used by the company in Kansas, where situated, and the value of the property owned and used outside of Kansas and where situated.

10. A statement of the assets and liabilities of the corporation.

11. The change or changes, if any, in the above particulars made since the last annual report.

"Such report shall be signed and sworn to before an officer duly authorized to administer oaths, by the president or vice-president and secretary or general manager and forwarded to the Secretary of State. Upon the filing of such report the Secretary of State, from the facts thus reported and any other facts coming to his knowledge bearing upon the question, shall determine the proportion of the issued capital stock of the company represented by its property and business in Kansas, and shall charge and collect from such company, in addition to the initial fees, for the privilege of exercising its franchise in Kansas, an annual fee upon that proportion of such foreign corporation's issued capital stock as is devoted to its Kansas business and to be not less

than ten dollars in any case, as follows: When the issued capital stock of the corporation used in Kansas does not exceed ten thousand dollars such annual fee shall be ten dollars; when the issued capital stock used in Kansas exceeds ten thousand dollars but does not exceed twenty-five thousand dollars the annual fee shall be twenty-five dollars; when the issued capital stock used in Kansas exceeds twenty-five thousand dollars but does not exceed fifty thousand dollars the annual fee shall be fifty dollars; when the issued capital stock used in Kansas exceeds fifty thousand dollars but does not exceed one hundred thousand dollars the annual fee shall be one hundred dollars; when the issued capital stock used in Kansas exceeds one hundred thousand dollars but does not exceed two hundred and fifty thousand dollars the annual fee shall be one hundred and twenty-five dollars; when the issued capital stock used in Kansas exceeds two hundred fifty thousand dollars but does not exceed five hundred thousand dollars the annual fee shall be two hundred and fifty dollars; when the issued capital stock used in Kansas exceeds five hundred thousand dollars but does not exceed one million dollars the annual fee shall be five hundred dollars; when the issued capital stock used in Kansas exceeds one million dollars but does not exceed two million dollars the annual fee shall be one thousand dollars; when the issued capital stock used in Kansas exceeds two million dollars but does not exceed three million dollars the annual fee shall be fifteen hundred dollars; when the issued capital stock used in Kansas exceeds three million dollars but does not exceed five million dollars, the annual fee shall be two thousand dollars; when the issued capital stock used in Kansas exceeds five million dollars the annual fee shall be two thousand five hundred dollars.

"Sec. 5. In case any corporation required to file the report and pay the fee prescribed in Sections one and two of this act shall fail or neglect to make such report within the period prescribed in said sections, respectively, such corporation shall be subject to a penalty of one hundred dollars, and an additional penalty of five dollars per day for each day's omission after the time limited in this act for filing such report and paying such fee. Such penalty and the annual fee or fees required to be paid by the provisions of Sections 1 and 2 of this act may be recovered by an action in the name of the State and on collection the fee shall be paid into the state treasury to the credit of the general revenue fund, and the penalty or penalties when collected shall be paid into the county school fund.

"Sec. 6. On complaint of the Secretary of State that any corporation has failed to pay the annual fees prescribed by this act, it shall be the duty of the county attorney, or the attorney general, to institute such action in the District Court of Shawnee County, Kansas, or of any county in which such corporation has an office or place of business. The failure of any domestic corporation to file the annual statement and to pay the annual fee herein provided for within ninety days of the time for filing and paying the same shall, in addition to other penalties, work the forfeiture of the charter of such corporation organized under the laws of this state and the Charter Board may at any time thereafter declare the charter of such corporation forfeited; and upon the declaration of any such forfeiture it shall be the duty of the attorney general to apply to the District Court of the proper county for the appointment of a receiver to close out the business of such corporation. The failure of any foreign corporation to file such annual statement as heretofore provided within ninety days from the time provided for filing the same shall work a forfeiture of its

right or authority to do business in this state and the Charter Board may at any time thereafter declare such forfeiture and shall forthwith publish such declaration in the official state paper. This section shall not be construed to restrict the state from invoking any other remedies provided by existing laws.

"Sec. 8. Any corporation shall have the right to be heard by the Secretary of State upon the matter of determination of the amount of fees due under the provisions of this act. Any corporation aggrieved by the decision of the Secretary of State may, within ten days, appeal to the governor, the attorney general and the State Bank Commissioner, whose decision in the matter shall be final.

"Sec. 9. If any corporation is aggrieved at the amount of the fees exacted of it under this act it may pay the same under protest, and such fee shall be kept by the Secretary of State in a special fund, and the corporation may bring suit in the District Court of Shawnee County, Kansas, to recover said fee or such part of it as may be just and equitable, but in no such case shall any costs be allowed, nor shall the Secretary of State suffer any personal liability. After any such suit is determined, any balance of such fee remaining with the Secretary of State shall be turned into the State treasury for the benefit of the general revenue fund.

"Sec. 10. (As amended by Sec. 1, Ch. 136, Laws 1913.) All educational, religious, scientific and charitable corporations and all banking, insurance, building and loan associations or corporations and all corporations which are not organized or operated for pecuniary profit which are not doing business for pay, are exempt from the provisions of this act; provided, that no other corporations doing business in this state shall be exempt; and provided

further that building and loan associations in order to secure such exemptions must list for taxation all mortgages by them owned in excess of capital stock." (Laws 1913, ch. 135.)

The demurrer submitted by the defendant in the trial court, to the amended petition of the plaintiffs, admitted all the facts in the amended petition which were well pleaded. It was therefore admitted by the demurrer that the capital stock of St. Louis & San Francisco Railroad Company was, at the time said suit was brought and had been for a long time prior thereto, invested in the railroads and property described in the amended petition, which extended into and across the several states therein named, a large portion of which railroads and property was situated outside of the State of Kansas. It was also admitted by the demurrer that the railroads described in the amended petition were at the time of the bringing of the suit, and for a long time prior thereto had been operated in carrying on the business of a common carrier of passengers and property for hire and engaged in interstate commerce between the several states therein named.

During the pendency of the action on appeal in the Supreme Court of Kansas, the term of office of Charles H. Sessions as Secretary of State, expired and the defendant in error, J. T. Botkin, succeeded him in office, and the action was duly revived against the present officer (Record, p. 12).

SPECIFICATION OF ERRORS.

1. The Supreme Court of the State of Kansas erred in rendering said final judgment affirming the judgment of the District Court of Shawnee County, Kansas, in favor of the defendant and against the plaintiffs in that court, sustaining the general demurrer filed by the defendant in the District Court of Shawnee County, Kansas, to the amended petition of the plaintiffs, these appellants, and for costs.

2. The said Supreme Court of the State of Kansas erred in holding and adjudging that the judgment rendered by the District Court of Shawnee County, Kansas, in favor of the defendant and against the plaintiffs, in said court, sustaining the general demurrer filed by the defendant in said District Court of Shawnee County, Kansas, to the amended petition of the plaintiffs, these appellants, and for costs was a valid and legal judgment.

3. Said Supreme Court of the State of the Kansas erred in holding and adjudging that the amended petition of the plaintiffs, these appellants, filed by them in the District Court of Shawnee County, Kansas, in said case, did not state facts sufficient to constitute a cause of action.

4. Said Supreme Court of the State of Kansas erred in holding and adjudging that Chapter 135 of the

Session Laws of the State of Kansas of 1913, constitutes a valid law and is not in conflict with that portion of Article I of the Constitution of the United States which provides that Congress shall have power to regulate commerce with foreign nations and among the several states and with the Indian tribes.

5. Said Supreme Court of the State of Kansas erred in holding and adjudging that Chapter 135 of the Session Laws of the State of Kansas of 1913, constitutes a valid law and is not in conflict with that portion of Article I of the Constitution of the United States which provides, "No state shall * * * pass any bill of attainder, *ex post facto* law or law impairing the obligation of contracts."

6. Said Supreme Court of the State of Kansas erred in holding and adjudging that said Chapter 135 of the Laws of Kansas of 1913, constitutes a valid law and is not in conflict with that portion of the Fourteenth Amendment to the Constitution of the United States, which provides that "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law."

7. Said Supreme Court of the State of Kansas erred in holding and adjudging that Chapter 135 of the Session Laws of Kansas of 1913, as applied to the capital

stock and property of the St. Louis and San Francisco Railroad Company, in charge of and controlled by its Receivers, did not place a burden upon interstate commerce.

8. Said Supreme Court of the State of Kansas erred in holding that Chapter 135 of the Session Laws of Kansas of 1913, was not a burden on or an attempt to regulate commerce among the several states.

9. Said Supreme Court of the State of Kansas erred in holding that Chapter 135 of the Session Laws of Kansas 1913, did not deprive the appellants, James W. Lusk, William C. Nixon and William B. Biddle, Receivers of the Railroads and property of St. Louis and San Francisco Railroad Company, of property, without due process of law.

10. Said Supreme Court of the State of Kansas erred in holding that Chapter 135 of the Session Laws of Kansas of 1913, did not impair the obligation of the contract made between the State of Kansas and St. Louis and San Francisco Railroad Company, under and in pursuance of Chapter 186 of the Session Laws of Kansas of 1887.

11. Said Supreme Court of the State of Kansas erred in holding that Chapter 135 of the Session Laws of Kansas of 1913, did not deprive the St. Louis and San Francisco Railroad Company of property without due process of law.

12. Said Supreme Court of the State of Kansas erred in holding that Chapter 135 of the Session Laws of Kansas of 1913, did not deny to these appellants, James W. Lusk, William C. Nixon and William B. Biddle, Receivers of the Railroads and Property of St. Louis and San Francisco Railroad Company, the equal protection of laws.

The questions involved in this case are:

(a) Chapter 135 of the Session Laws of 1913, under which the tax was demanded, is unconstitutional, because the act, when applied to railroad companies organized under the laws of the State of Kansas, owning and operating railroad lines extending into and through the State of Kansas and other states, over which the business of interstate commerce is carried on, places a burden upon said interstate commerce and seeks to tax property situated outside of the State of Kansas. It is therefore a violation of the commerce clause of the constitution.

(b) Chapter 135 of the Session Laws of 1913, seeks to place a tax upon the entire capital stock of domestic corporations owning and operating railroads in Kansas and other states, and thereby attempts to tax property situated beyond the boundaries of the State of Kansas, and in contravention of the Fourteenth Amendment to the Federal Constitution. It is therefore void as to domestic corporations.

(c) The compliance by the St. Louis and San Francisco Railroad Company, a Missouri corporation, with the terms of Chapter 186, Laws of Kansas of 1887, we contend, constituted a contract between the railroad company and the state, by which the state bound itself not to subject the railroad company or the plaintiffs in error to any greater liabilities than those imposed upon railroad corporations organized under the laws of Kansas, and conferred upon such foreign corporation complying with said act, "all the rights, privileges and franchises" of Kansas railroad corporations. It follows, that if Chapter 135, Laws of Kansas, 1913, is unconstitutional and void as to domestic corporations, then the imposition of the tax in question, upon a foreign railroad corporation complying with the Act of 1887, would subject it to greater liabilities than those imposed upon domestic corporations, would deny it the rights, powers and privileges of Kansas corporations, contrary to the terms of said act, would violate the obligation of the contract resulting from compliance by the foreign railroad corporation with the terms of said act, and would deny it the equal protection of the laws.

These questions were all raised by the demurrer filed to the amended petition in the trial court, and are presented by the several assignments of error contained in the record in this court.

BRIEF OF ARGUMENT.

The first question presented by this proceeding in error is, whether or not the provisions of Chapter 135 of the Session Laws of 1913, as applied to the business conducted by railroad corporations organized and existing under the laws of the State of Kansas, but owning and operating railroad lines extending through the State of Kansas and other states, over which interstate commerce is carried on, are a violation of the commerce clause of the Federal Constitution. While the plaintiffs in error are receivers for a foreign railroad corporation, and the statute in question provides that such foreign railroad corporation shall pay a tax on that portion of its capital stock devoted to business in Kansas, yet, if the act is a nullity as to railroad corporations organized and doing business under the laws of the State of Kansas, then the tax cannot be exacted of a foreign corporation or the receivers of such corporation, which complied with the Act of 1887, as will hereinafter appear.

It is necessary, therefore, to consider the question, in this case, as to whether or not the law is invalid as applied to railroad corporations organized under the laws of the State of Kansas but owning railroads situated in that state and other states, with which and over which interstate commerce is carried on. We will therefore consider this question first. It is presented by the first, second, third, fourth, seventh and eighth assignments of error (Record, 21).

The tax involved is not in lieu of property tax.

There is no claim or pretense that the sum exacted was the ordinary tax upon the property of the corporation situated in Kansas. Its property had been assessed and taxed under a different provision of the statutes. That tax had been paid in common with taxes on all other like property. The tax provided for by Chapter 135, however, was a separate and additional tax, aside from that which plaintiff in error had been required to pay upon its property situated in Kansas.

It is the contention of the plaintiffs in error that the law referred to, insofar as it relates to corporations organized under the laws of the State of Kansas and doing an interstate business in the manner described in the amended petition, is in conflict with the commerce clause of the Constitution of the United States and is specifically condemned by the decision of this court both in the case of the *Western Union Telegraph Company* v. *Kansas,* 216 U. S. 1, and in the case of *Pullman Company* v. *Kansas,* 216 U. S. 56.

The statute provides no method for ascertaining proportion of stock of domestic corporations devoted to Kansas business.

The legislature, in Chapter 135 of the Session Laws of 1913, evidently did not fully comprehend the rulings of this court in the Telegraph and Pullman cases. It is provided in the Laws of 1913 that foreign corporations shall pay an annual fee upon the amount of their capital

stock devoted to business in Kansas. The act provides the method by which the amount of the capital stock of foreign corporations devoted to business in Kansas may be ascertained. This provision seems to be in harmony with the ruling of this court in a number of cases. But no provision is made for ascertaining the amount of stock of a domestic corporation devoted to business in Kansas, although it is just as essential that this be done in case of a domestic corporation owning and operating property situated in Kansas and other states, as in the case of a foreign corporation. So long as the state seeks to require the payment of a fee upon that portion of the capital stock of a corporation only which is devoted to the transaction of business in Kansas, it seems that no constitutional objection could be urged. The legislature seems to have assumed, however, that the ruling of this court in the Telegraph and Pullman cases did not apply to domestic corporations whether engaged exclusively in intrastate business or in business which was partly intrastate and partly interstate.

Court cannot reshape statute.

There being no provision in Chapter 135 of the Session Laws of 1913 for ascertaining the amount of the capital stock of domestic corporations devoted to business in Kansas, the tax therein sought to be levied applies to the entire capital stock of the corporation, and the court cannot do what the legislature failed to do and provide a method for ascertaining what portion of the

capital stock is devoted to business in Kansas. This court expressly so held in *Meyer, Auditor, etc.* v. *Wells-Fargo Company*, 223 U. S. 298, when it said:

> "Neither the court below nor this court can reshape the statute simply because it embraces elements that it might have reached if it had been drawn with a different measure and intent."

The statute imposes a burden on interstate commerce and seeks to tax property beyond the jurisdiction of the State of Kansas, within Telegraph and Pullman cases.

While this court, in the Telegraph and in the Pullman case was dealing with the rights of foreign corporations, the principles discussed and announced in those cases apply with equal force to corporations organized in Kansas, provided they are engaged in the business of carrying on interstate commerce and their capital stock and property is devoted to that business, and the larger part situated outside of the state. The law of 1913 attempts to require the payment by a corporation of a tax therein provided for upon the entire capital stock of domestic corporations, regardless of whether said stock is used in the transaction of business in Kansas or in other states and regardless of whether the capital stock is invested in property in Kansas or in other states and whether the corporation carries on interstate commerce or not. The law referred to, insofar as it relates to a corporation organized under the laws of the State of Kansas, owning property outside of the state

and doing interstate business in the manner described in the amended petition of the plaintiffs in error in this case, is in conflict with the commerce clause of the Constitution of the United States and comes within the decisions of this court in both the Pullman and Telegraph cases above referred to.

When the state sought to require of railroad corporations organized under the laws of the State of Kansas, but owning property situated in that state and other states, with which they carried on interstate commerce, the payment of $2500.00, as a corporation tax or fee on their entire capital stock which was invested in their property situated in several states and used in carrying on interstate commerce, it sought in effect to place a tax upon the instrumentalities with which interstate commerce was carried on and also to tax property situated beyond the boundaries of the State of Kansas and therefore outside of its jurisdiction. This was expressly held in the case of *Western Union Telegraph Company* v. *Kansas, supra,* and the *Pullman Company* v. *Kansas, supra.* The opinion in the Telegraph case extends over fifty-six pages and it is therefore impractical to quote it at any considerable length in this brief, but that the court may grasp at a glance our contention, we desire to quote briefly several extracts from the opinion, leaving the court to examine the entire opinion and the authorities therein cited.

On page 31, the court, quoting from a prior decision, says:

"There are sufficient modes in which the internal business, if not already taxed in some other way, may be subjected to taxation, without the imposition of a tax which covers the entire operations of the company."

Further remarking, the court said:

"So, in the case now before us, the exaction, as a condition of the privilege of continuing to do or doing local business in Kansas, that the Telegraph Company shall pay *a given per cent of its authorized capital stock*, is, for every practical purpose, a tax both on the company's local business in Kansas, and on its interstate business or on the privilege of doing interstate business; for, the statute, by its necessary operation, will accomplish precisely the result that would have been accomplished had it been made *in express words*, a condition of doing local business that the Telegraph Company should submit to taxation upon both its interstate and intrastate business and upon its interests and property everywhere, as represented by its capital stock. The exaction made by the Kansas statute is as much a tax on the interstate business of the company and on its property outside of the state as a fee or tax on the sale of an article imported only for sale or as a tax on the occupation of an importer would be a tax on the property imported."

Further, on page 32, the court said:

"But, as already said, what part of the fee exacted by Kansas is to be attributed to intrastate business and what part to interstate business the State has not chosen to ascertain and declare. It has seen proper to exact a specified per cent of the authorized capital of the Telegraph Company, representing, necessarily, all its business, interstate and intrastate, and all its property interests in and out

of the State. It is important here to observe—indeed, the contrary could not be asserted—that the Telegraph Company lawfully entered Kansas, with the consent of both the Territory and State, for the purposes of its business of every kind long before, and was legally there when the Bush Act was passed."

Further, on page 37, it is said:

"It is easy to be seen that if every state should pass a statute similar to that enacted by Kansas not only the freedom of interstate commerce would be destroyed, the decisions of this court nullified and the business of the country thrown into confusion, but each state would continue to meet its own local expenses not only by exactions that directly burdened such commerce, but by taxation upon property situated beyond its limits."

On page 38, it was said:

"It is firmly established that, consistently with the due process clause of the Constitution of the United States, a State cannot tax property located or existing permanently beyond its limits. *Louisville, etc.*, v. *Kentucky*, 188 U. S. 385, 398; *Union Transit Co.* v. *Kentucky*, 199 U. S. 194, 209."

On page 42 of the opinion, it was said:

"The statute of Kansas forbids the doing of local business within its limits by a corporation of another state or foreign country except subject to the condition that such corporation first pay to the state a given per cent of its entire capitalization representing the value of all its business, property and interests within and without the state, thereby placing a direct burden on the privilege or franchise of transacting interstate commerce and taxing property rights beyond the jurisdiction of the state for purposes of taxation."

On pages 46 and 47, the opinion states:

> "If it be true that the statute of Kansas, by its necessary operation, imposes a burden on the interstate business of the Telegraph Company, and subjects its property and business outside of that State to taxation, then the constitutional validity of the statute, in the particulars adverted to, may be here adjudged without any reference whatever to the judgment in the Prewitt case and without re-examining the grounds upon which that judgment rested."

No distinction between foreign and domestic corporations.

It would seem that there could be no doubt about the meaning of those portions of the opinion of this court herein quoted. In the discussion of the questions involved, the court made no distinction between the rights of foreign corporations and those of domestic corporations. Both classes of corporations are protected by the commerce clause of the Constitution, if their capital stock is invested in and represents property which the corporations are using in carrying on interstate commerce, and which is situated in different states. It is as much a violation of the commerce clause of the Constitution, for the state to tax the whole of the capital stock which represents the property with which a domestic corporation carries on interstate commerce, as it is to tax the instrumentalities of a foreign corporation used in carrying on interstate commerce. It is as much a violation of the Constitution for a state to exact a tax on all the capital stock of a domestic corporation as a

condition to its right to do business in Kansas, where the property which its stock represents is used in carrying on interstate commerce and is situated in different states, as it is to exact a tax on the entire stock of a foreign corporation under like circumstances.

In the Telegraph case, *supra*, on page 36, the court further said:

> "If a domestic corporation engaged in the business of soliciting orders for goods manufactured, sold and delivered to a state, should, in addition solicit orders for goods manufactured in and to be brought from another state for delivery, could the former state make it a condition of the right to engage in local business within its limits that the corporation pay a given per cent of *all* fees or commissions received by it in its business, interstate and domestic? There can be but one answer to this question, namely, that such a condition would operate as a direct burden on interstate commerce, and therefore would be unconstitutional and void. Consistently with the Constitution no court could, by any form of decree, recognize or give effect to or enforce such a condition."

In the case of *Philadelphia & Southern Steamship Co.* v. *Pennsylvania*, 122 U. S. 326, it was held that a tax upon the gross receipts of a steamship company, incorporated under the laws of Pennsylvania, which receipts were derived from the transportation of persons and property by sea, between different states and to and from foreign countries, was a regulation of interstate commerce and in conflict with the Constitution of the United States. There, the complainant corporation

owed its existence to the state which sought to tax its gross receipts. The court held that, notwithstanding it was a creature of the state which sought to tax its receipts, the receipts which it was sought to tax being derived from both intrastate and interstate business, it was an attempt to regulate interstate commerce.

The facts in that case are so similar to those in the case now under consideration and the language of the court, expressed in the opinion, is so pertinent that we deem it proper to quote therefrom as follows:

> "The second ground on which the decision referred to was based was, that the tax was upon the franchise of the corporation granted to it by the state. We do not think that this can be affirmed in the present case. It certainly could not have been intended as a tax on the corporate franchise, because, by the terms of the act, it was laid equally on the corporations of other states doing business in Pennsylvania. If intended as a tax on the franchise of doing business, which in this case is the business of transportation in carrying on interstate and foreign commerce—it would clearly be unconstitutional. It was held by this court in the case of *Gloucester Ferry Company* v. *Pennsylvania*, 114 U. S. 196, that interstate commerce carried on by corporations is entitled to the same protection against state exactions which is given to such commerce when carried on by individuals. In that case the tax was laid upon the capital stock of a ferry company incorporated by New Jersey, and engaged in the business of transporting passengers and freight between Camden, in New Jersey, and the city of Philadelphia. The law under which the tax was imposed was passed by the Legislature of Pennsylvania on the 7th of June, 1879, and de-

cared 'that every company or association whatever, now or hereafter incorporated by or under any law of this commonwealth, or now or hereafter incorporated by any other state or territory of the United States, or foreign government, and doing business in this commonwealth,' * * * (with certain exceptions named), 'shall be subject to and pay into the treasury of the commonwealth annually a tax to be computed as follows, namely:' the amount of tax is then rated by the dividends declared, and imposed upon the capital stock of the company at the rate of so many mills, or fractions of a mill, for every dollar of such capital stock. It was contended that the ferry company could not hold property in Philadelphia for the purpose of carrying on its ferrying business, and could not carry on its said business there without a franchise, express or implied, from the state of Pennsylvania. But this court held, in its opinion, delivered by Mr. Justice Field, that the business of landing and receiving passengers and freight at the wharf in Philadelphia was a necessary incident to, and a part of, their transportation across the Delaware River from New Jersey; that without it, that transportation would be impossible; that a tax upon such receiving and landing of passengers and freight is a tax upon their transportation, that is, upon the commerce between the two states involved in such transportation; and that Congress alone can deal with such transportation; its non-action being equivalent to a declaration that it shall remain free from burdens imposed by state legislation. The opinion proceeds as follows: 'Nor does it make any difference whether such commerce is carried on by individuals or corporations. *Welton* v. *Missouri*, 91 U. S. 275; *Mobile* v. *Kimball*, 102 U. S. 691. As was said in *Paul* v. *Virginia*, 8 Wall. 168, at the time of the formation of the Constitution, a large part of the commerce of the

world was carried on by corporations; and the East India Company, the Hudson Bay Company, the Hamburgh Company, the Levant Company, and the Virginia Company were mentioned as among the corporations which, from the extent of their operations, had become celebrated throughout the commercial world. The grant of power (to Congress) is general in its terms, making no reference to the agencies by which commerce may be carried on. It includes commerce by whomsoever conducted, whether by individuals or corporations' (p. 204). Again, 'While it is conceded that the property in a state belonging to a foreign corporation engaged in foreign or interstate commerce may be taxed equally with like property of a domestic corporation engaged in that business, we are clear that a tax or other burden imposed on the property of either corporation because it is used to carry on that commerce, or upon the transportation of persons or property, or for the navigation of the public waters over which the transportation is made, is invalid and void as an interference with, and obstruction of, the power of Congress in the regulation of such commerce' (p. 211). It is hardly necessary to add that the tax on the capital stock of the New Jersey Company, in that case, was decided to be unconstitutional, because, as the corporation was a foreign one, the tax could only be construed as a tax for the privilege or franchise of carrying on its business, and that business was interstate commerce.

"The decision in this case, and the reasoning on which it is founded, so far as they relate to the taxation of interstate commerce carried on by corporations, apply equally to domestic and foreign corporations. No doubt the capital stock of the former, regarded as inhabitants of the state, or their property, may be taxed as other corporations

> and inhabitants are, provided no discrimination be made against them as corporations carrying on foreign or interstate commerce, so as to make the tax, in effect, a tax on such commerce. But their business as carriers in foreign or interstate commerce cannot be taxed by the state, under the plea that they are exercising a franchise."

The case just quoted from was referred to and the doctrine therein announced was affirmed by the same court, in *Galveston, Harrisburg & San Antonio Ry. Co.* v. *The State of Texas*, 210 U. S. 217; the court saying:

> "In *Philadelphia & Southern Mail S. S. Co.* v. *Pennsylvania*, 122 U. S. 326, it was decided that a tax upon the gross receipts of a steamship corporation of the State, when such receipts were derived from commerce between the States and with foreign countries, was unconstitutional. We regard this decision as unshaken and as stating established law."

In the case of *Galveston, Harrisburg & San Antonio Ry. Co.* v. *Texas, supra*, the court considered the validity of a law enacted by the State of Texas, which sought to impose a tax upon railroad companies, equal to one per cent of their gross receipts. The railroad company whose rights were involved in that case, was a domestic corporation and did not operate any railroad beyond the limits of the State of Texas, but it carried on an interstate business in connection with other railroads, that did extend beyond the confines of the State of Texas. The court held the law invalid, as it placed a burden upon interstate commerce, and among other things, said:

"We are of opinion that the statute levying this tax does amount to an attempt to regulate commerce among the states. The distinction between a tax 'equal to' one per cent of gross receipts and a tax of one per cent of the same, seems to us nothing, except where the former phrase is the index of an actual attempt to reach the property and to let the interstate traffic and the receipts from it alone. We find no such attempt or anything to qualify the plain inference from the statute taken by itself. On the contrary, we rather infer from the judgment of the state court and from the argument on behalf of the state that another tax on the property of the railroad is upon a valuation of that property taken as a going concern. This is merely an effort to reach the gross receipts, not even disguised by the name of an occupation tax, and in no way helped by the words 'equal to.'

"Of course, it does not matter that the plaintiffs in error are domestic corporations or that the tax embraces indiscriminately gross receipts from commerce within as well as outside of the state. We are of the opinion that the judgment should be reversed."

Both the decision construing the Pennsylvania law and the decision construing the Texas law, support our contention that whether or not a given corporation is a domestic corporation, is of no importance.

Other Cases Involving Similar Taxes.

Since the decision of the Supreme Court in the Telegraph and Pullman cases, the same court has handed down other decisions which affirm the principles announced in those cases.

In *Meyer, Auditor of the State of Oklahoma* v. *Wells-Fargo & Co.*, 223 U. S. 298, the court had before it a law of the State of Oklahoma which required corporations doing both interstate and intrastate business, to make a return of their gross receipts from all sources, and when such returns were made, the corporations were required to pay a tax on the gross receipts, of three per cent. The express company declined to pay the tax, because it claimed the law required it to pay it upon receipts derived from carrying on interstate commerce as well as intrastate commerce. The court held the law invalid and said:

> "The plaintiff's receipts are largely from commerce among the states, and it also receives large sums as income from investments in bonds and land all outside the State of Oklahoma. So that it is evident that if the tax is what it calls itself it is bad on the former ground, and that whatever it is it is bad on the latter. *Fargo* v. *Hart*, 193 U. S. 490. In that case the tax was proportioned to mileage, and it was held that it could not be sustained when, although purporting to be a tax on property, it took into account, in order to increase proportionately the value of the mileage within the state, valuable property outside of it. The same principle would apply to a property tax measuring the total property by the total gross receipts increased by the special outside sources of income and taxing a proportion of this total fixed by the ratio of business within the state to that outside. But we see no warrant for calling the tax a property tax. It is so similar to the Texas statute held bad in *Galveston, Harrisburg & San Antonio Ry. Co.*, v. Texas, 210 U. S. 217, as to show that, if one is not copied from the other, they have a common

source. It would be possible only by some extraordinary turn of ingenuity to sustain this after condemning that."

"It was argued in some detail that taking into account the rest of the act and other statutes passed later at the same session this really was a property tax. But the scope and purport of the act, so far as it affects express companies, are too obvious to admit such a view. The tax is 'in addition to the taxes levied and collected upon an *ad valorem* basis.' Even if we read the words which follow without a comma, viz., 'upon the property and assets of such corporation,' as not qualifying those which immediately precede, but as attempting to characterize the 'gross revenue tax' as a tax on such property and assets, nevertheless all the property and assets are the subject of the *ad valorem* taxes referred to. Therefore this tax cannot be an attempt to reach the value of what is by the law to be valued and taxed in a different way. It would be difficult to apply to a tax levied in these days the explanation of *Maine* v. *Grand Trunk Ry. Co.*, 142 U. S. 217, given in *Galveston, Harrisburg & San Antonio Ry. Co.* v. *Texas*, 210 U. S. 217, 266; *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 162-165, and to suppose it intended to reach only the additional value given by its being part of a going concern to property already taxed in its separate items. There is nothing sufficient to indicate such a limitation, and for the reasons given above on the authority of *Fargo* v. *Hart*, 193 U. S. 490, it is plain that the gross receipts from all sources could not have been used as a means for estimating the going value of the property in the state. We may add in this connection that this same requirement as to the total gross receipts shows that it is impossible to save the constitutionality of the act by construing it as referring only to the receipts from commerce wholly within the state."

In *Ludwig* v. *Western Union Telegraph Co.*, 216 U. S. 146, a statute of Arkansas was considered by this court, which exacted of foreign corporations, as a condition of their doing business in Arkansas, the payment of certain fees, measured by the entire amount of their capital stock. This court in holding the law invalid said:

> "The capital stock of the company represents, we repeat, all its business, property and interests throughout the United States and foreign countries, and the requirement that the company, engaged in interstate commerce, may continue to do a local business in Arkansas, and escape the heavy penalties prescribed, must pay a given amount (in this case $25,050), based on all its capital stock, merely for filing its articles of incorporation with the Secretary of State, is, in effect, a direct burden and tax on its interstate business, as well as on its property outside of the State."

The reasoning of the court in the cases from which we have just quoted, applies to the question presented in this case. The plaintiffs in error in this case, as receivers of the railroads and property of the St. Louis and San Francisco Railroad Company, have been required to pay a tax upon the property of said company, situated in the State of Kansas, the same as owners of other properties in the state. The statute now in question, attempts to impose an additional tax or fee, ~~not only~~ upon the stock of said railroad company, representing the property situated within the state, ~~but on stock~~ and on stock of domestic railway corporations representing its property situated everywhere, both in Kansas and other states. This court, in the case just quoted from, holds that that

is not a property tax, and if it was it would be taxing property, much of which, as the amended petition alleges in this case, is situated outside of the State of Kansas. We submit that under the decisions referred to, the statute under which the plaintiffs in error were required to pay to the secretary of state two thousand five hundred dollars, is unconstitutional.

In the Telegraph case, and in the Pullman case, it was held that the state could not exact the payment of a per cent on the entire capital stock of those companies, for the privilege of doing a local business in the State of Kansas. On the same principle, the state cannot exact of the plaintiffs in error a tax on ~~their entire capital stock much of which~~ that portion of the capital stock devoted to business in Kansas, because the law is invalid as to domestic corporations whose stock is invested in property outside of the State of Kansas and all of which is devoted to carrying on interstate commerce, in order that the plaintiffs in error may conduct a local business in Kansas.

Minnesota and Baltic Mining Cases Distinguished.

It is the contention of the defendant in error that this case is not to be governed by the rule laid down in the Telegraph and Pullman cases, and other cases herein cited, but that it comes within the decisions of this court in *United States Express Company* v. *Minnesota*, 223 U. S. 335, and in *Baltic Mining Company* v. *Commonwealth of Massachusetts*, 231 U. S. 68.

The property sought to be taxed in the case of the *United States Express Company* v. *Minnesota*, was altogether of a different character than that sought to be

taxed in the case at bar, or rather the capital stock which was used as a standard of taxation in that case was invested in a different class of property than in the case now under consideration. The St. Louis and San Francisco Railroad Company has its means invested in property that cannot be removed. It is fixed and permanent, as was true in the Telegraph case. In the Minnesota case it was held that the law there under consideration was intended to afford a means of valuing the property of the Express Company within the state, for the purpose of taxation. The tax imposed under the law involved in that case was the only tax that was imposed upon the property of the Express Company. The statute there expressly provided that the tax sought to be collected was in lieu of all taxes upon the property. There is no similarity between the facts in that case and those involved in the case at bar. In the opinion in the Minnesota case, this court emphasized the fact that the property of express companies, being much of it of an intangible character, it is difficult to reach and properly assess for taxation. The property of a railway company is all tangible property and has a definite location and character. It is not difficult for the state authorities to place a value upon that portion of it situated in the State of Kansas.

In the opinion in the Minnesota case, this court said (p. 346):

> "That court held that the statute was part of a system long in force in Minnesota, passed under the authority of the State Constitution, and was in-

tended to afford a means of valuing the property of express companies within the state. While the determination that the tax is a property tax measured by gross receipts is not binding upon this court, we are not prepared to say that this conclusion is not well founded, in view of the provisions and purpose of the law."

There is a marked distinction between the case of *Baltic Mining Co.* v. *Massachusetts, supra,* and the case at bar.

(a) The Act involved in the Massachusetts case did not apply to corporations engaged in railroad, telegraph, telephone, etc., business.

The Act involved in the case at bar applies to corporations engaged in railroad, telegraph, telephone, etc., business.

(b) In the Baltic Mining Co. case the Act did not apply to corporations whose business is interstate commerce.

The Act involved in the case at bar applies to corporations whose business is interstate commerce.

(c) Neither of the companies involved in or parties to the Baltic Mining Co. case was chartered to engage in or carry on a commerce business.

In the case at bar the plaintiff in error was not chartered to engage in or carry on any business other than the business of commerce.

(d) In the Baltic Mining Co. case the two corporations involved were carrying on a purely local and

domestic business quite separate from their interstate transactions.

In the case at bar the plaintiff in error was engaged in interstate commerce and was using at all times in question for such purpose all of the capital stock which was taxed in this case.

(e) In the Baltic Mining Company case the agreed facts showed that only a portion of the authorized capital stock of the corporations was taxed.

In the case at bar the allegations contained in the petition of the plaintiff in error, showing that all of its capital stock was taxed by the Act involved, were admitted to be true by the demurrer of the State.

These propositions are apparent from the following language of Mr. Justice Day, in speaking for the court:

> "Construing the act in question, the Supreme Judicial Court of Massachusetts has held that it does not apply to corporations engaged in railroad, telegraph, telephone, etc., business which are taxed on another plan under the provisions of the statute. It is held not to apply to corporations whose business is interstate commerce or who carry on interstate and intrastate business in such close connection that the intrastate business cannot be abandoned without serious impairment of the interstate business of the corporations. * * *
>
> "In the cases at bar the business for which the companies are chartered is not of itself commerce. * * * From the statement of facts it is apparent, however, that each of the corporations in question is carrying on a purely local and domestic business quite separate from its interstate transactions. * *

> * While the tax is imposed by taking a percentage of the authorized capital, the agreed facts show that the authorized capital is only a part of the capital of the corporations, respectively. * * *"

In view of the language of this court in the foregoing opinion, and in the holding of the Supreme Judicial Court of Massachusetts, it is difficult to see where the decision in that case supports the contention of defendant in error in this case.

It will be contended by the defendant in error that the tax imposed was only a franchise tax and, therefore, can be upheld as such. The court will look to the effect of imposing the tax, rather than to the name of it. The statute does not call it a franchise tax when required by Kansas corporations; neither does it provide that it shall be a tax on the right to exist or do business as a corporation. It simply provides that upon the filing of the statement there described, with the Secretary of State, the corporation shall pay to the Secretary of State a sum equal to a certain per cent on its entire capital stock.

In the case of *Crane Company* v. *Looney, Attorney General, et al.*, 218 Fed. 260, the Circuit Court of Appeals for the Fifth Circuit, considered an enactment of the State of Texas, very similar in terms to the statute involved in this case, and held it to be unconstitutional. The court in that case reviewed the opinion of this court in *Baltic Mining Company* v. *Commonwealth of Massachusetts*, and clearly distinguished that case from the case which it considered.

There were two statutes of the State of Texas, considered by the court in the Crane Company case, and they are as follows:

"For each foreign corporation obtaining permit to do business in this state shall pay fees as follows: Fifty dollars for the first ten thousand dollars of its authorized capital stock, and ten dollars for each additional ten thousand dollars, or fractional part thereof: Provided, that the fee required to be paid by any foreign corporation for a permit to engage in the manufacture, sale, rental, lease or operation of all kinds of cars, or to engage in conducting, operating or managing any telegraph lines in this state, shall in no event exceed ten thousand dollars; provided, however, that mutual building and loan companies, so called, whose stock is not permanent, but withdrawable, shall pay a fee of fifty dollars for the first one hundred thousand dollars, or a fractional part thereof, of its authorized capital stock, and ten dollars for each additional one hundred thousand dollars, or a fractional part thereof; and where the company is a foreign one, then the fee shall be based upon the capital invested in the State of Texas. (Acts 1907, S. S. p. 500. Acts 1905, p. 135. Acts 1889, p. 93. Acts 1889, p. 87. Acts 1883, p. 72. Acts 1909, S. S. p. 267)."

Article 7394 is as follows:

"Art. 7394. Tax to be paid by Foreign Corporations.—Except as herein provided, each and every foreign corporation, authorized, or that may hereinafter be authorized to do business in this state, shall on or before the first day of May of each year, pay in advance to the Secretary of State a franchise tax for the year following, which shall be computed as follows, viz: One dollar on each one thousand dollars, or fractional part there-

of, of the authorized capital stock of the corporation up to and including one hundred thousand dollars, and two dollars on each five thousand dollars or fractional part thereof of such stock in excess of one hundred thousand dollars and up to and including one million dollars, and two dollars on each twenty thousand dollars, or fractional part thereof, of such stock in excess of one million dollars, and up to and including ten million dollars, and two dollars on each fifty thousand dollars of such stock in excess of ten million dollars, unless the total amount of the capital stock of such corporation issued and outstanding, plus its surplus and undivided profits shall exceed its authorized capital stock; and in that event the franchise tax of such corporation for the year following shall be two dollars on each one thousand dollars, or fractional part thereof, of the authorized capital stock of such corporation, issued and outstanding, plus its surplus and undivided profits, up to and including one hundred thousand dollars, and two dollars on each five thousand dollars, or fractional part thereof, of such stock, surplus and undivided profits in excess of one hundred thousand dollars, and up to and including one million dollars, and two dollars on each twenty thousand dollars, or fractional part thereof, of such stock, surplus and undivided profits in excess of one million dollars and up to and including ten million dollars, and two dollars on each fifty thousand dollars of such stock, surplus and undivided profits in excess of ten million dollars; provided, that such franchise tax shall not in any case be less than twenty-five dollars (Acts 1907, p. 503, Sec. 2)."

The Court of Appeals in holding these statutes invalid, said:

"It is revealed that the business of plaintiff under its charter is not itself commerce. It is en-

gaged in the manufacture and sale of certain goods and in the purchase and sale of the goods of other manufacturers. The greater part of these goods are disposed of in interstate commerce, and a small portion in intrastate commerce in Texas. A decidedly preponderating percentage of the plaintiff's property is located outside the state of Texas. The same preponderating percentage of its business is done outside the state.

"(1) By the terms of the above statutes the state sought to fix upon certain classes of foreign corporations an excise tax for the privilege of exercising their franchises within the state of Texas. That a franchise tax of this character is within the power of the state to levy there can be no question. *Maine* v. *Grand Trunk Railway Co.*, 142 U. S. 228, 12 Sup. Ct. 121, 163, 35 L. Ed. 994.

"(2) The validity of the tax can in no way be dependent upon the mode which the state may deem fit to adopt in fixing the amount for any year which it will exact for the franchise. No constitutional objection lies in the way of a legislative body prescribing any mode of measurement to determine the amount it will charge for the privileges it bestows. *Home Insurance Co.* v. *New York*, 134 U. S. 594, 10 Sup. Ct. 593, 33 L. Ed. 1025. However, a state cannot say to a corporation: 'You may do business within our borders if you permit your property to be taken without due process of law, or you may transact business in interstate commerce subject to the regulatory power of the state. To allow a state to exercise such authority would permit it to deprive of fundamental rights those entitled to the protection of the Constitution in every part of the Union;' but a tax levied by the state upon the right of a corporation to do business in the state (that is, a franchise

tax), will not be invalidated unless its necessary effect is to burden interstate commerce. *Baltic Mining Co.* v. *Massachusetts*, 231 U. S. 68, 34 Sup. Ct. 15, 58 L. Ed. 127.

"(3) Does compliance by the plaintiff with the statutes here complained of impose a burden upon interstate commerce, or violate the provisions of the first section of the fourteenth amendment to the Constitution? The necessary effect of the enforcement of the two statutes brought into question is to make plaintiff's right to do a Texas intrastate business dependent upon the payment of a sum which becomes greater or less according as its assets outside of the state and its interstate and foreign business grow greater or smaller, though its property situated in Texas and its intrastate business there may remain stationary. The case of the Baltic Mining Company, cited *supra*, was not one in which there was any such necessary relation between the amount of the excise charge and the amount or value of the corporation's property outside of the state or of its interstate or foreign business. The charge imposed by the statute there in question was measured by the amount of the par value of its authorized capital, without regard to the actual value of its assets, whether more or less than that of its nominal capital stock. The charge was not measured by the amount or value of the corporation's assets or the extent of its actual business anywhere or of any kind. The terms of the statute made the charge the same, whether the actual value of the assets of the corporation was more or less than the amount of the par value of its authorized capital stock, and whatever may have been the nature or extent of the business in which it was engaged. Nothing said in the opinion rendered in that case indicates the court's departure from or modification of the rule

announced in *Western Union Telegraph Co.* v. *Kansas*, 216 U. S. 1, 42, 30 Sup. Ct. 190, 54 L. Ed. 355, to the effect that a state may not forbid the doing of a local business within its limits by a corporation of another state or foreign country except subject to the condition that such corporation first pay to the state a given per cent. of its entire capitalization, representing the value of all its business, property, and interests within and without the state, thereby placing a direct burden on the privilege or franchise of transacting interstate commerce and taxing property rights beyond the jurisdiction of the state for purposes of taxation. The joint effect of the two statutes, considered together, as they must be, as the right of the corporation to do business in the state is withheld if either of them is not complied with, is to make the privilege of doing a local business in Texas subject to the condition that it shall first pay to the state a given per cent. of all its capital and surplus, representing all of its property wherever situated, and all its business, intrastate and interstate.

"An imposition which is based, whether in whole or in substantial part, on the value of property outside of the state, or on interstate or foreign commerce engaged in, so that the amount of it grows in exact proportion to the growth of such property or commerce, is a burden on such property or commerce. This burden the state cannot impose, either directly or as a condition to the grant of a privilege which it may confer or withhold. The statutes in question so obviously impose such a burden that it is not permissible to regard them as privilege taxes or excises, the amount of which is determined by something not having a necessary relation to the amount or value of things which are not subjects of the state's taxing power.

> The exactions being so made that the amount of them cannot be determined without taking into account the amount of property and business which are not subject to state taxation, and being greater or less according as such property or business is greater or less, the necessary effect of the enforcement of them is to burden such property or business."

If the Circuit Court of Appeals of the Fifth Circuit was correct in its holding on the validity of the Texas statutes, then the statute of Kansas cannot stand as applied to a corporation whose capital stock is invested in property used in interstate and intrastate commerce in such close connection that the one cannot be abandoned without injury to the other. The record shows that such is the case with reference to the property of the St. Louis and San Francisco Railroad Company.

Chapter 135, supra, violates the obligation of the contract between the State and the Railroad Company.

If, under the foregoing authorities, the law cannot be enforced against railroad comporations organized under the laws of the State of Kansas and owning property extending into and through the State of Kansas and other states over which they carry on the business of interstate commerce, then the law cannot be enforced against plaintiffs in error, because when the St. Louis and San Francisco Railroad Company came into the

State of Kansas in 1896 and complied with the laws of that state and acquired property as alleged in the amended petition of plaintiffs in error, an implied contract was created between the corporation and the State of Kansas, which prevented the state from afterwards passing or enforcing any law against the St. Louis and San Francisco Railroad Company or its property, that could not be enforced against railroad corporations organized under the laws of the State of Kansas, and their property. The enforcement of this law against the plaintiffs in error and the property of the St. Louis and San Francisco Railroad Company, when it cannot be enforced against railroad corporations organized under the laws of the State of Kansas, would be the passing and enforcing of a law impairing that contract.

This proposition is supported by this court in *American Smelting & Refining Company* v. *Colorado ex rel. Lindsley*, 204 U. S. 103. The ruling of the court in that case is concisely set forth in the syllabi, as follows:

> "Although a state may impose different liabilities on foreign corporations than those imposed on domestic corporations, a statute that foreign corporations pay a fee based on their capital stock for the privilege of entering the state and doing business therein and thereupon shall be subjected to all liabilities and restrictions of domestic corporations, amounts to a contract with foreign corporations complying therewith that they will not be subjected during the period for which they are admitted to greater liabilities than those imposed

> on domestic corporations, and a subsequent statute imposing higher annual license fees on foreign, than on domestic, corporations for the privilege of continuing to do business, is void as impairing the obligation of such contract as to those corporations which have paid the entrance tax and received permits to do business; nor can such a tax be justified under the power to alter, amend and repeal reserved by the State Constitution."

It is clear from the opinion in the above case that the American Smelting & Refining Company went into the State of Colorado and complied with a statute which was very much the same as the statute which the St. Louis and San Francisco Railroad Company complied with when it came into the State of Kansas in 1896. The court held that the state, in exacting a fee from the Smelting Company, which was a foreign corporation, different from that which it exacted from domestic corporations, violated that part of the Constitution of the United States which provides that no state shall pass a law impairing the obligation of contracts.

The law providing the manner in which foreign railroad corporations might do business in Kansas, in force at the time the St. Louis and San Francisco Railroad Company came into the state, is embodied in Chapter 186 of the Session Laws of 1887. The language of that statute is almost, if not quite, identical with the language of the Colorado statute construed by this court in the Smelting Company case. The Kansas statute provides:

"Any railroad company of any state or territory which shall purchase or lease a railroad or railroads in this state, shall possess and enjoy within this state, all the rights, powers, privileges and franchises conferred by the laws of this state upon railroad corporations of this state."

If Chapter 135, *supra*, cannot be enforced against railroad corporations organized under the laws of the State of Kansas, then it cannot be enforced against railroad corporations organized under the laws of other states but which have come into the State of Kansas under the provisions of the Act of 1887 and acquired the right to do business and acquire property under the law in force prior to the time of the enactment of the tax law now in question, to-wit, Chap. 135, *supra*, without placing a burden upon the foreign corporation, which the state does not exact of domestic corporations.

Denial of equal protection of the laws.

In the case of *Southern Ry. Co.* v. *Greene*, 216 U. S. 400, this court considered a law of the State of Alabama, which required the payment by foreign corporations doing business in that state, of an annual franchise tax upon the actual amount of the capital stock employed by them in the state, which was different from the tax exacted of domestic corporations. The contention was, in that case, that the law violated the contract clause of the Constitution, as well as that portion of the Fourteenth Amendment, which provides that no state shall pass a law that denies to citizens equal protection of the

laws. The facts in that case were substantially the same as those alleged in this case.

The court in the syllabus said:

> "Whatever power a state may have to exclude or determine the terms of the admission of foreign corporations not already within its borders, it cannot subject a foreign corporation which has already come into the state in compliance with its laws and has acquired property of a fixed and permanent nature to a new and additional franchise tax for the privilege of doing business which is not imposed upon domestic corporations. It would be an unconstitutional denial of equal protection of the laws under the Fourteenth Amendment; and so held as to the franchise tax on foreign corporations of Alabama of 1907."

If the law of Alabama condemned by the court in the case above referred to, denied to foreign corporations equal protection of the laws under the Fourteenth Amendment, and if Chapter 135 of the Session Laws of 1913 is invalid as to domestic railroad corporations doing interstate business, it is also invalid as to foreign railroad corporations doing business in Kansas which came into the state in the manner and under the circumstances which it is alleged in the amended petition in this case, the St. Louis and San Francisco Railroad Company came into Kansas in the year 1896. Chapter 135, under the circumstances named, would be as much a denial of the equal protection of the laws under the Fourteenth Amendment, as was the statute of Alabama.

We ask the court's careful attention to the allegations of the amended petition filed by plaintiffs in error

in the trial court, because all things which were properly pleaded, must be deemed admitted by the demurrer.

Chapter 135 of the Session Laws of Kansas of 1913 authorizes the state to tax property situated beyond its boundaries. It therefore deprives plaintiffs in error of the equal protection of the laws, and in this particular is a violation of the Fourteenth Amendment to the Constitution. Under such circumstances, it would also deprive the plaintiffs in error of property without due process of law, in violation of the Fourteenth Amendment to the Constitution.

A corporation may pay under protest and recover taxes.

If the statute was invalid, then the plaintiffs in error had the right to pay it under protest and to bring this suit to recover the amount so paid. This procedure is especially approved by the court in the case of *The Atchison, Topeka & Santa Fe Railway Co.* v. *O'Connor*, 223 U. S. 280. In the syllabi of that case, it is said:

> "Where, in addition to money penalties for delay in payment of a tax, there is forfeiture of right to do business and risk of having contracts declared illegal in case of non-payment of disputed tax, the payment is made under duress.
>
> "Where a state officer receives money for a tax paid under duress with notice of its illegality, he has no right thereto and the name of the state does not protect him from suit.
>
> "Where a state statute provides for refunding taxes erroneously paid to a state officer, it contemplates a suit against such officer to recover the taxes paid under protest and duress."

For the foregoing reasons and under the authorities presented, the Supreme Court of Kansas erred in affirming the judgment of the District Court of Shawnee County.

Respectfully submitted,

R. R. VERMILION,
Attorney for Plaintiffs in Error.

W. F. EVANS,
Of Counsel.

No. 451.

In the Supreme Court of the United States.

OCTOBER TERM, 1915.

JAMES W. LUSK, WILLIAM C. NIXON, and WILLIAM B. BIDDLE, Receivers of the Railroads and Property of ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY, *Plaintiffs in Error,*

vs.

J. T. BOTKIN, SECRETARY OF STATE OF THE STATE OF KANSAS, *Defendant in Error.*

In Error to the Supreme Court of the State of Kansas.

BRIEF AND ARGUMENT OF DEFENDANT IN ERROR.

S. M. BREWSTER,
Attorney-general,
JAMES P. COLEMAN.

W. P. MONTGOMERY,
J. L. HUNT,
Of Counsel.

6-1691

SUBJECT INDEX.

ALPHABETICAL INDEX OF STATUTES AND CASES.

In the Supreme Court of the United States.

OCTOBER TERM, 1915.

JAMES W. LUSK, WILLIAM C. NIXON, and WILLIAM B. BIDDLE, Receivers of the Railroads and Property of ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY, *Plaintiffs in Error,*

vs.

J. T. BOTKIN, SECRETARY OF STATE OF THE STATE OF KANSAS, *Defendant in Error.*

No. 451.

In Error to the Supreme Court of the State of Kansas.

BRIEF AND ARGUMENT OF DEFENDANT IN ERROR.

STATEMENT.

The contention of the plaintiff in error in this case is to the effect that the provisions of chapter 135 of the Session Laws of 1913, as applied to railroad companies organized under the laws of the state of Kansas, and which are engaged in interstate commerce, is violative of the federal constitution in imposing a burden upon said interstate commerce, and in taxing property situated outside of the state of Kansas, and that the act being for these reasons void as to domestic railway corporations is void as to railway corporations of other states licensed to do business in Kansas. That, being unenforceable as to domestic corporations, if enforced against a foreign corporati[illegible] the act is violative of a contract between the state and plaintiffs in error, in imposing greater liabilities upon the foreign corporation than upon domestic corporations.

The moving premise upon which plaintiffs in error have predicated their appeal is that the act imposes a burden upon interstate commerce as applied to domestic railway companies engaged in such commerce. This question has been fully discussed in the briefs submitted to this court, at this same term, in case No. 450, Kansas City, Fort Scott & Memphis Railway Company v. J. T. Botkin, and what is stated in behalf of defendant in error in that case will be substantially repeated here.

The act in question, as applied to domestic railway corporations, does not regulate or burden interstate commerce.

I.

Chapter 135, Session Laws of Kansas of 1913, imposes an excise tax upon the right or privilege of domestic corporations to exist as such corporations under the laws of the state of Kansas.

Such portions of the act (chapter 135, 1913 Laws of Kansas) as relate to this phase of the question will be briefly stated. Section 1 prescribes the form of annual report to be filed by domestic corporations, and requires that "at the time of filing such annual report it shall be the duty of every corporation for profit or for carrying on any kind of business, incorporated under the laws of this state, to pay to the secretary of state an annual fee, as follows: . . . when the paid-up capital stock exceeds five million dollars the annual fee shall be twenty-five hundred dollars."

Section 2 requires a similar report from foreign corporations licensed in Kansas, and the payment of an annual fee, computed from the portion of such company's capital stock as is devoted to its Kansas business, "for the privilege of exercising its franchise in Kansas."

Section 5 provides for a recovery of the annual fee by civil action in the name of the state. Section 6 authorizes the forfeiture of the charters of domestic corporations and of the licenses of foreign corporations for nonpayment of the annual fees. Section 10, as amended by chapter 136, Laws of 1913, exempts educational, religious, scientific, and charitable corporations, and all banking, insurance, and building and loan corporations, and all corporations not organized for pecuniary profit. Section 12 exempts corporations required to make de-

tailed reports to other state departments (including railway companies which report to the Utilities Commission) from making the detailed report to the secretary of state required in sections 1 and 2, except as to their issued and paid-up capital, so that the proper amount of fee may be ascertained.

The franchises of domestic corporations are the creatures of the state creating the corporation. They are granted by the state, and depend for their existence upon the existence of the state. It is therefore right that the privilege of possessing and exercising such franchises should bear a fair proportion of taxation.

"The right or privilege to be a corporation or to do business as such body is one generally deemed of value to the corporators, or it would not be sought in such numbers as at present. . . . The granting of such right or privilege rests entirely in the discretion of the state, and, of course, when granted, may be accompanied with such conditions as its legislature may judge most befitting to its interests and policy. It may require as a condition of the grant of the franchise, and also of its continued exercise, that the corporation pay a specific sum to the state each year, or month, or a specific portion of its gross receipts, or of the profits of its business, or a sum to be ascertained in any convenient mode which it may prescribe." Home Ins. Co. v. New York, 134 U. S. 594.

The right to exercise franchises of this character is more valuable in case of a large corporation than in case of a small one, and the amount of the capital stock of the corporation involved is naturally taken as the measure or value of the franchise granted, and as the measure of compensation demanded by the state in exchange for such grant.

"The validity of the tax [upon the privilege to be a corporation] can in no way be dependent upon the mode which the state may deem fit to adopt in fixing the amount for any year which it will exact for the franchise. No constitutional objection lies in the way of a legislative body prescribing any mode of measurement to determine the amount it will charge for the privileges it bestows. . . . Its action in this matter is not the subject of judicial inquiry in a federal tribunal." Home Ins. Co. v. New York, 134 U. S. 594.

This is patently not a property or *ad valorem* tax, nor is it in lieu of any property tax. It is stated in section 2 of the act that the annual fee shall be paid by a foreign corporation "for the privilege of exercising its franchise in Kan-

sas." The tax is not a charge or lien upon any of the physical property of the corporation. The only means of collection the state has is by civil action. The only penalty upon nonpayment is forfeiture of the charter or franchise. Thus the state takes away the privilege for which the charge is exacted, if this privilege be not paid for. The state is not taxing the property of the corporation, nor its capital stock, but is exacting a fee for the privilege of corporate existence. It should be noted that there is no determination of the value of the capital stock or of the property in which it is invested, as would be necessary in levying any tax other than a franchise tax. It is pertinent also that the highest capitalization taken as an index of the franchise value is five million dollars. If this were anything other than a franchise tax the state would certainly consider capitalization in excess of five million dollars in levying the tax.

The Kansas supreme court defined this charge as a franchise tax. The court said:

"The fee collected is a tax upon the right of corporate existence—the franchise granted by the state to be a corporation —to do business with the advantages associated with that form of organization."

Railway Co. v. Sessions, 95 Kan. 261.

Franchise taxes of this character have been such a frequent subject of judicial determination by this court that defendant in error will but briefly call the court's attention to its former decisions defining such taxes. If a tax is imposed directly by the legislature without assessment, and its sum is measured by the business done, or the extent to which the conferred privileges have been enjoyed or exercised by the taxpayer, or by the amount of capital employed in exercising such privileges, without respect to the nature or value of the taxpayer's assets, it should be considered a franchise tax. These considerations determined this court's decision in Society for Savings v. Coite, 6 Wallace, 594; Hamilton Manufacturing Company v. Commonwealth of Massachusetts, 6 Wallace, 632; Provident Institution for Savings v. Commonwealth of Massachusetts, 6 Wallace, 611.

II.

The state has full power to impose such a privilege tax.

The right of the state to impose conditions upon which it will confer corporate privileges, and to exact payment for such

privileges, has never been seriously questioned. In Society for Savings v. Coite, *supra*, this court said:

"Nothing can be more certain in legal decision than that the privilege and franchises of a private corporation . . . may be taxed by a state for the support of the state government."

See, also, Hamilton Manufacturing Company v. Commonwealth of Massachusetts, 6 Wallace, 632;

Provident Institution for Savings v. Commonwealth of Massachusetts, 6 Wallace, 611;

Horn Silver Mining Company v. New York, 143 U. S. 305;

Philadelphia Ry. Co. v. Pennsylvania, 15 Wallace, 284;

Phila. Steamship Co. v. Pennsylvania, 122 U. S. 326;

Minot v. Ry. Co., 18 Wallace, 206.

III.

Such a franchise tax, if otherwise valid, may be computed or measured in amount by the amount of the capital stock of the corporation employed in part in carrying on interstate commerce.

It is not contended by The State that it can burden or regulate interstate commerce through the exercise of its taxing powers, but that the state may impose a franchise tax upon the entire capital of the corporation—all of which is employed in exercising the thing taxed, *i. e.*, the franchise, notwithstanding the corporation is engaged in interstate commerce, or that such commerce may be indirectly affected thereby. Where a tax is lawfully imposed upon the exercise of privileges, within the taxing power of the state, the measure of such tax may be the income from the property of the corporation, although a part of such income is derived from property in itself not taxable. The distinction lies between the intention to tax the property as such and to measure a legitimate tax upon the privileges involved in the use of such property.

Flint v. Stone Tracy Company, 220 U. S. 107.

Further instances of valid taxes levied against legitimate objects of taxation, although measured in part by capital employed in or by receipts from property or business not itself taxable, as distinguished from taxes levied directly or levied indirectly, but substantially, upon nontaxable property, are discussed in U. S. Express Company v. Minnesota, 223 U. S. 335, wherein the court holds to the doctrine that an otherwise valid tax may be computed by reference to things not taxable.

A more recent decision sustaining the same rule of law is Baltic Mining Company v. Massachusetts, 231 U. S. 68, where it is stated:

"It is well settled . . . that the power of Congress over interstate commerce is supreme under the federal constitution and that the states may not burden such commerce. . . . It is equally well settled that forms of regulation prohibited to the state by the constitution may consist of efforts to tax the carrying on of such commerce and of attempted levies of taxes upon the receipts of interstate commerce as such. . . .

"While this is true, other equally well established principles must be borne in mind in considering the validity of the state tax attacked upon grounds of unconstitutionality. The mere fact that a corporation is engaged in interstate commerce does not exempt its property from state taxation. . . . It is the commerce itself which must not be burdened by state exactions which interfere with the exclusive federal authority over it. A resort to the receipts of property or capital employed in part at least in interstate commerce, when such receipts or capital are not taxed as such, but are taken as a mere measure of a tax of lawful authority within the state, has been sustained. . . ."

The court approved the language of the supreme court of Massachusetts in considering the character of the tax in this same case, wherein the Massachusetts court said:

"The required payment is strictly of an excise tax and not of a tax upon property. . . . This excise tax is for the commodity or privilege of having an establishment for business in Massachusetts with the protection of our laws and the financial and other advantages of a situation here."

Further in the opinion of the supreme court of the United States we find the following:

"That the state may impose a tax upon a corporation, foreign or domestic, for the privilege of doing business within its borders is undoubted. . . ."

"Every case involving the validity of a tax must be decided upon its own facts, and having no disposition to limit the authority of those cases, the facts upon which they were decided must not be lost sight of in deciding other and alleged similar cases. . . ."

"An examination of the previous decisions in this court shows that they have been decided upon the application to the facts of each case of the principles which we have undertaken to state, and a tax has only been invalidated where its necessary effect was to burden interstate commerce. . . ."

"The conclusion, therefore, that the authorized capital is only used as the measure of a tax in itself lawful without the necessary effect of burdening interstate commerce, brings the legislation within the authority of the state, so, if the tax is, as we hold it to be, levied upon a legitimate subject of such taxation, it is not void because imposed upon property beyond the state's jurisdiction, for the property itself is not taxed. In so far as it is represented in the authorized capital stock it is used only as a measure of taxation, and, as we have seen, such measure may be found in property or in the receipts from property not in themselves taxable."

In every case wherein this court has determined a so-called franchise tax to be invalid it appeared to the court from its consideration of the state statute imposing the tax that the *res* taxed was in fact the capital or property employed in or receipts obtained from interstate commerce. But where the court determined that the thing taxed was the franchise itself, it has approved the measurement of such a valid tax by a computation based upon the capital employed in or receipts derived from such interstate commerce.

IV.

The statute imposing the tax provides that the amount to be paid for the privilege for which it is required shall be determined by reference to the capital employed in exercising that privilege, and such capital, or the property in which such capital is invested, is not itself taxed.

The capital stock of the corporation is not itself taxed, but it is resorted to as a mere measure of a tax upon the franchise of the corporation. As heretofore pointed out, there is no provision for ascertaining the actual value of the issued capital stock, or of the property in which it is invested, of any domestic corporation. Any tax levied against the capital or property as such must necessarily be based upon some ascertained value. It is common knowledge that the shares of stock of different corporations, each representing the same face value or par value, may have vastly different monetary values. However, it may be very naturally considered that the naked franchise giving a corporation the right to exist, with a certain specified capital stock, is as valuable as any other naked franchise permitting an equal capitalization. If the capital stock or property of the corporation were valued in money under the provisions of this taxing statute there might be reason to con-

sider that such capital or property was being taxed. But such is not the present instance.

There is no taking of property upon default in payment of the tax, nor a lien upon the shares of stock or the capital or any funds of the corporation. Upon nonpayment the state only takes away that for which the tax is exacted—the corporate franchise—and, in case of a foreign company, its corporate license. The state imposes a charge against the primary franchise of all domestic corporations, including carriers, and measures the tax according to the capital employed in exercising such franchise.

It is immaterial, therefore, that the capital stock is invested in property outside of the state which is used in interstate commerce.

"From the very nature of the tax, being laid upon a franchise given by the state, and revocable at pleasure, it can not be affected in any way by the character of the property in which its capital stock is invested. The power of the state over the corporate franchise, and the conditions upon which it shall be exercised, is as ample and plenary in the one case as in the other."

Home Ins. Co. v. New York, 134 U. S. 594.

"In the case now before the court the tax . . . is levied upon the corporation for the privilege of carrying on its business in a corporate or organized capacity. As the chief judge says, if the parties beneficially interested in the company are dissatisfied with the price exacted by the state for this privilege, they may carry on the business as individuals without paying any charge. In other words, the charge is not upon the navigation of the river, but is upon the doing of business as a corporation of the state within the state. While the state may not require a navigation license . . . it may certainly, as to a corporation of its own creation, having property within its borders, enforce its usual and customary systems of taxation without infraction of the superior authority and laws of the United States concerning the navigation of rivers."

New York, *ex rel.*, v. Sohmer, 35 S. C. R. 162.

So here the charge is not upon interstate commerce, but is upon the doing of business as a corporation of the state.

V.

The statute in question, as applied to domestic railway corporations, does not burden interstate commerce.

As heretofore stated, the state is exacting a charge from its domestic corporations for the privilege of corporate existence,

with its accompanying rights and privileges. The fact that the exercise of these rights is involved, in whole or in part, in the carrying on of interstate commerce, does not deprive the state of the right to impose charges upon them, if the same charges are imposed upon all franchises, whether the corporations exercising them are engaged in interstate commerce or not. The same rule applies in the case of such rights as in the case of physical property. Both, if within the state, are subject to taxation by the state, whether used in carrying on interstate commerce or not.

In Philadelphia Railroad Company v. Pennsylvania, 15 Wallace, 284, the state of Pennsylvania required all railroad companies to pay a tax of three-fourths of one per cent upon the gross receipts of the companies. This court held this tax to be valid, upon two grounds: first, because the tax was upon receipts after they had been received and mingled with other property of the corporation, so as to have lost all connection with interstate commerce; and, second, because the charge in question was a tax upon the franchise of the company. On the latter point the court said:

"There is another view of this case to which brief reference may be made. It is not to be questioned that the States may tax the franchises of companies created by them, and that the tax may be proportioned either to the value of a franchise granted, or to the extent of its exercise; nor is it deniable that gross receipts may be a measure of proximate value, or, if not, at least of the extent of enjoyment. If the tax be, in fact, laid upon the companies, adopting such a measure imposes no greater burden upon any freight or business from which the receipts come than would an equal tax laid upon a direct valuation of the franchise. In both cases, the necessity of higher charges to meet the exaction is the same.

"Influenced by these considerations, we hold that the act of the legislature of the state imposing a tax upon the plaintiffs in error equal to three-quarters of one per cent of their gross receipts is not invalid because in conflict with the power of Congress to regulate commerce among the states."

In Philadelphia Steamship Company v. Pennsylvania, 122 U. S. 326, the law of the state of Pennsylvania required all corporations incorporated by it to pay a tax of eight-tenths of one per cent upon the gross receipts of such companies. This tax was held to be void, as a burden upon interstate commerce, the court criticising the first reason given for sustaining the law in the case of Philadelphia Railroad Company v. Pennsyl-

vania, above cited. But the court approved the second reason therein given, saying:

"The decision in this case, and the reasoning on which it is founded, so far as they relate to the taxation of interstate commerce carried on by corporations, apply equally to domestic and foreign corporations. No doubt the capital stock of the former, regarded as inhabitants of the state, or their property, may be taxed as other corporations and inhabitants are, provided no discrimination be made against them as corporations carrying on foreign or interstate commerce, so as to make the tax, in effect, a tax on such commerce."

In Minot v. Railroad Company, 18 Wallace, 206, the law of the state of Pennsylvania required all railroad companies incorporated by it to pay a tax of one-fourth of one per cent upon the actual cash value of every share of its capital stock, with a proviso that, in the case of railroads lying partly within and partly without the state, the company should be required to pay on such number of its shares of capital stock only as would be in that proportion to the whole number of shares which the length of the road within the state should bear to the total length of the road. It was contended that this division of the capital stock was not an equitable division as to the company, and did not enable the state to reach the fair value of the property taxed within the state. The court held, however, that, since the thing taxed, that is, the franchise of the company, was something which the state had full power to tax, the method of arriving at the value of the thing taxed was immaterial. The court said:

"The state may impose taxe upon the corporation as an entity existing under its laws, a ell as upon the capital stock of the corporation or its separate corporate property. And the manner in which its value shall be assessed and the rate of taxation, however arbitrary or capricious, are mere matters of legislative discretion. It is not for us to suggest in any case that a more equitable mode of assessment or rate of taxation might be adopted than the one prescribed by the legislature of the state; our only concern is with the validity of the tax; all else lies beyond the domain of our jurisdiction."

In that case the court said further:

"The tax imposed by the act in question affects commerce among the states and impedes the transit of persons and property from one state to another just in the same way, and in no other, that taxation of any kind necessarily increases the expenses attendant upon the use or possession of the thing taxed.

That taxation produces this result of itself constitutes no objection to its constitutionality. As was very justly observed in this court in a recent case, 'Every tax upon personal property, or upon occupations, business or franchises, affects more or less the subjects, and the operations of commerce. Yet it is not everything that affects commerce that amounts to a regulation of it, within the meaning of the constitution.' (Philadelphia Ry. Co. v. Pennsylvania, 15 Wall. 284.)

"The exercise of the authority which every state possesses to tax its corporations and all their property, real and personal, and their franchises, and to graduate the tax upon the corporations according to their business or income, or the value of their property, when this is not done by discriminating against rights held in other states, and the tax is not on imports, exports or tonnage, or transportation to other states, can not be regarded as conflicting with any constitutional power of Congress."

In Ferry Company v. East St. Louis, 107 U. S. 365, the court said:

"The exaction of a license fee is an ordinary exercise of the police power by municipal corporations. When, therefore, a state expressly grants to an incorporated city, as in this case, the power to license, tax and regulate ferries, the latter may impose a license tax on the keepers of ferries, although their boats ply between landings lying in two different states, and the act by which this exaction is authorized will not be held to be a regulation of commerce."

If a license tax on the charters of ferries which are engaged in interstate commerce is not a burden upon interstate commerce, it must follow that a similar tax upon the right to be a corporation is not a burden upon interstate commerce.

In Ashley v. Ryan, 153 U. S. 436, it was determined by the supreme court, as stated in the headnote to the opinion, that:

"If several railroad corporations, each existing under the laws of separate states, consolidate into one corporation, a statute of one of the states, imposing a charge upon the new consolidated company of a percentage on its entire authorized stock as the fee to the state for the filing of the articles of consolidation in the office of the secretary of state of the state, without which filing it could not possess the powers, immunities, and privileges which appertain to a corporation in that state, is not a tax on interstate commerce, or the right to carry on the same, or the instruments thereof; and its enforcement involves no attempt on the part of the state to extend its taxing power beyond its territorial limits.

"A state, in permitting a foreign corporation to become one of the constituent elements of a consolidated corporation, or-

ganized under its laws, may impose such conditions as it deems proper, and the acceptance of the franchise implies a submission to the conditions without which the franchise could not have been obtained."

In the opinion the court says:

". . . Whether this charge be viewed as a tax, a license, or a fee, if its exaction violated the interstate commerce clause of the constitution of the United States, or involved the assertion of the right of a state to exercise its powers of taxation beyond its geographical limits, it was void, whatever might be the technical character affixed to the exaction.

"The purpose of the tender of the articles of consolidation to the secretary of state was to secure to the consolidated company certain powers, immunities, and privileges which appertain to a corporation under the laws of Ohio. The rights thus sought could only be acquired by the grant of the state of Ohio, and depended for their existence upon the provisions of its laws. Without the state's consent they could not have been procured. . . . Hence, in seeking to file its articles of incorporation, the company was applying for privileges, immunities, and powers which it could by no means possess, save by the grace and favor of the constitution of the state of Ohio and the statutory provisions passed in accordance therewith. At the time the articles were presented for filing, the statute law of the state charged the parties with notice that the benefits which it was sought to procure could not be obtained without payment of the sum which the secretary of state exacted. As it was within the discretion of the state to withhold or grant the privilege of exercising corporate existence, it was, as a necessary resultant, also within its power to impose whatever conditions it might deem fit as prerequisite to corporate life. The act of filing, constituting, as it did, a claim of a right to the franchise granted by the state law, carried with it a voluntary assumption of any burden with which the privilege was accompanied, and without which the right of corporate existence could not have been procured. . . . Having thus accepted the act of grace of the state and taken the advantages which sprang from it, the company can not be permitted to hold on to the privilege or right granted, and at the same time repudiate the condition by the performance of which it could alone obtain the privilege which it sought. . . ."

"It follows from these principles that a state, in granting a corporate privilege to its own citizens, or, what is equivalent thereto, in permitting a foreign corporation to become one of the constituent elements of a consolidated corporation organized under its laws, may impose such conditions as it deems proper, and that the acceptance of the franchise in either case implies a submission to the conditions without which the franchise could not have been obtained. . . .

"The question here is not the power of the state of Ohio to lay a charge on interstate commerce, or to prevent a foreign corporation from engaging in interstate commerce within its confines but simply the right of the state to determine upon what conditions its laws as to the consolidation of corporations may be availed of.

"Considering, as we do, that the payment of the charge was a condition imposed by the state of Ohio upon the taking of corporate being or the exercise of corporate franchises, the right to which depended solely on the will of that state, and hence that liability for the charge was entirely optional, we conclude that the exaction constituted no tax on interstate commerce, or the right to carry on the same, or the instruments thereof, and that its enforcement involved no attempt on the part of the state to extend its taxing power beyond its territorial limits."

In Railroad Company v. Maryland, 21 Wall. 456, wherein the court sustained a charge of one-fifth of the amount received from the transportation of passengers over a certain railroad as not being a burden upon interstate commerce, the court said:

"It may, incidentally, affect transportation, it is true; but so does every burden or tax imposed on corporations or persons engaged in that business. Such burdens, however, are imposed *diverso intuitu*, and in the exercise of an undoubted power. The state is conceded to possess the power to tax its corporations, and yet every tax imposed on a carrier corporation affects more or less the charges it is compelled to make upon its customers. So, the state has an undoubted power to exact a bonus for the grant of a franchise, payable in advance or *in futuro;* and yet that bonus will necessarily affect the charge upon the public which the donee of the franchise will be obliged to impose. The stipulated payment in this case, indeed, is nothing more or less than a bonus."

VI.

The question involved is not within the rule of law determined in Western Union Telegraph Company v. Kansas, 216 U. S. 1, and Pullman Company v. Kansas, 216 U. S. 56.

Plantiff in error relies upon the two recent decisions last above mentioned in support of its contention that the state has burdened interstate commerce. The cases mentioned are easily to be distinguished from the present instance. In the Telegraph Company and Pullman cases the state attempted to exact a given per cent upon the entire capital stock of these foreign corporations invested throughout the United States,

solely in exchange for the privilege of doing a local intra-state business. Neither corporation was a creature of the state attempting thus to tax it. Neither corporation had secured from the state the privilege of corporate existence, or the privilege of issuing the stock which was taxed, or the privilege of accumulating in a corporate capacity the property in which such capital was invested. The only privilege which the corporations had secured from the state of Kansas was that of doing a local intra-state business, and the state was attempting to tax the whole of their capital solely on account of that privilege. The Telegraph Company was required to pay a fee of $20,100, the Pullman Company $14,800—sums measured by their entire capitalization, in the computation of which every dollar of their issued capital stock was reached—solely for the privilege of maintaining their local offices and transacting their local business. The measurement of the tax was wholly unrelated to the privilege which was taxed.

The Kansas supreme court, in the decision involved in this appeal, examined the Western Union Telegraph Company and Pullman cases, and pertinently remarked:

"As already suggested, for the state to assess a tax gauged by the total capital stock, upon the right to exist as a corporation, which it has granted, is a very different thing from requiring a business to pay the state a percentage of what it earns by each transaction undertaken, some of them being of an interstate character. A tax measured by the capital stock may in some situations be equivalent to a charge upon the whole business done, while in others it is not. In the case just quoted from, the statute which was held void undertook to require a foreign corporation, as a condition to doing a purely local business in Kansas, to pay a fee fixed by a graduated percentage of its total capital stock, which was largely employed in business elsewhere, and in interstate commerce. There was no logical connection between the amount charged and the extent or value of the business done wholly within the state, the only matter over which the state had control. Here the amount of the tax has a direct relation to the scope and value of the privilege conferred and controlled by the state—the right to be a corporation."

Railway Co. v. Sessions, 95 Kan. 261.

VII.

Other cases distinguished.

In the case of Philadelphia Steamship Company v. Pennsylvania, relied upon by plaintiff in error, and cited elsewhere in this brief, this court declared the tax invalid because it was not a franchise tax, but a tax upon the business of carriers engaged in interstate commerce. The same is true in Galveston, Harrisburg & San Antonio Ry. Company v. Texas, 210 U. S. 217. In Meyer v. Wells Fargo Express Company, 223 U. S. 298, the court held the statute of Oklahoma to be similar to the Texas statute previously considered, and condemned it for the same reasons. In Ludwig v. Western Union Tel. Co., 216 U. S. 146, the complaining company was a foreign corporation, but was taxed upon its entire capitalization, not for the privilege of corporate existence, but for its local business. The same is true of Crane Company v. Looney *et al.*, 218 Fed. 260.

Plaintiff in error contends that the present instance differs from the Baltic Mining Company case in that the facts substantially showed that only a portion of the company's capital was taxed in that case, and asserts that in this case all of its capital is taxed. However, the pleadings show that the corporation has a paid-up capital of $31,660,000, but that the tax is graduated only up to a capitalization of $5,000,000—the fee limited to $2500. In the Baltic Mining Company case the court reasoned that limiting the tax to a maximum of $2000 led to the conclusion that the authorized capital was only used as a measure of a lawful tax, and without the necessary effect of burdening commerce. The same is true in the present instance.

VIII.

No denial of due process and equal protection of the laws.

Under the fifth, seventh, and eighth assignments of error, plaintiff in error predicates his argument upon the premise that the property represented by the capital stock of the plaintiff in error is attempted to be taxed by the state under the act in question. As heretofore pointed out, the property of the corporation is not taxed, nor is the capital stock of the corporation invested in such property taxed. The privilege of being a Kansas corporation is the privilege for which the tax is exacted. The statute is not subject to these objections unless it be also void for reasons heretofore urged by plaintiff in error.

Domestic corporations seek and obtain from the state of Kansas the primary franchise of being corporations, upon which franchise their whole corporate existence is built. The state has required payment for this valuable privilege, and has adopted as a measure of the price it will exact for the privilege a sum computed by reference to the capital involved in possessing and exercising that privilege. It is exacting a tax for the same privilege measured in the same manner from every other corporation existing under its laws. It is exacting from foreign corporations a privilege tax measured in the same ratio, by the capital employed within the state in exercising the license granted to do business within the state. The tax imposed is within the lawful authority of the state, and is not invalid by reason of the fact that it may indirectly and remotely affect interstate commerce.

IX.

No violation of contractual obligations.

Plaintiffs in error have claimed the attention of the court solely on the ground that the act is void as to domestic corporations, and if applied to plaintiffs in error would exact from them a tax not required from domestic corporations. Having seen that the act is valid and enforceable against domestic corporations, it therefore appears that no contractual obligations, if such there be, between the state and the plaintiffs in error have been violated. However, defendant will briefly comment upon the authorities cited by plaintiffs in error in support of their contention.

In American Smelting and Refining Company v. Colorado, 204 U. S. 103, this court held, in effect, that under a statute similar to the Kansas statute cited on page 55 of plaintiffs' brief, a contract existed between the state and the smelting company to the effect that it would not be subjected to any greater liabilities than those imposed on domestic corporations. However, in that case, the exaction imposed upon foreign corporations was double that required from domestic corporations. The court said:

"Whatever be the name or nature of the tax, it must be measured in amount by the same rate as is provided for the domestic institution, and, if the latter is not taxed in that way, neither can the state thus tax the foreign corporation."

The ruling of the court was, in effect, that domestic corporations may be required to pay a franchise tax and that foreign corporations may be required to pay a license tax, but that if this is done the tax must be measured in amount by the same rate exactly as is done under the provisions of sections 1 and 2 of chapter 135 of the Laws of 1913. An inspection of these two sections will show that a domestic corporation pays a fee measured in amount by the capital employed in exercising the franchise which is taxed, and that section 2 requires from foreign corporations a license fee measured in amount by the capital employed in exercising the license to do business in Kansas which is taxed. The same ratio between the amount of the tax and the capital by which it is measured is employed in both cases.

In Southern Railway Company v. Green, 216 U. S. 400, the decision hinged upon the fact, as alleged in the complaint of the railway company, that the act in question, under which the complainant was compelled to pay an annual franchise tax of $22,458.00, did not apply to persons or corporations of the state of Alabama owning the same character of property and carrying on the same kind of business as was owned and carried on by corporations organized under the laws of other states, nor was there any similar exaction against domestic corporations engaged in the same business. This decision is wholly inapplicable to the present situation.

Equal protection of the laws is obtained if the act operates alike upon all those similarly situated, who are within its provisions, and does not subject an individual to an arbitrary exercise of legislative power. Defendant in error reiterates that the provisions of the act operate alike upon all those similarly situated. All domestic corporations are taxed for the privilege of corporate existence, and the tax is measured in amount by a reference to the capital of the corporation employed in exercising its corporate life and functions. Foreign corporations are taxed for the privilege of exercising their franchises in Kansas, and the tax is measured in amount

by the capital employed in exercising the privilege which is taxed. In both cases there is the same ratio between the amount of the tax and the amount of the capital by which it is measured. Respectfully submitted.

S. M. BREWSTER,
Attorney-general,
JAMES P. COLEMAN.

W. P. MONTGOMERY,
J. L. HUNT,
Of Counsel.

□

No. 451.

In the Supreme Court of the State of Kansas.

JAMES W. LUSK, WM. C. NIXON, and WM. B. BIDDLE, Receivers of the railroad and property of the St. Louis & San Francisco Railroad Company, *Plaintiff in Error*,

vs.

J. T. BOTKIN, Secretary of State of the State of Kansas, *Defendant in Error*.

REPLY OF DEFENDANT IN ERROR TO BRIEF AND ARGUMENT OF THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, AMICUS CURIÆ.

S. M. BREWSTER,
Attorney-General.

JAS. F. COLEMAN,
Attorneys for Defendant in Error.

W. F. MONTGOMERY,
JOHN L. HUEY,
Of Counsel.

INDEX TO CASES AND STATUTES.

In the Supreme Court
of the United States.

(OCTOBER TERM, 1915.)

JAMES W. LUSK, WM. C. NIXON, and WM. B. BIDDLE, Receivers of the railroad and property of the St. Louis & San Francisco Railroad Company, *Plaintiff in Error,*

vs.

J. T. BOTKIN, Secretary of State of the State of Kansas, *Defendant in Error.*

No. 451.

REPLY OF DEFENDANT IN ERROR TO BRIEF AND ARGUMENT OF THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, AMICUS CURIÆ.

The attention of the court is respectfully directed to the fact that the arguments advanced in the voluminous brief of the Chicago, Rock Island & Pacific Railway Company, *amicus curiæ,* are not predicated upon any question contained in the record in the case now before the court. Although defendant in error has consented to the filing of this brief, he has not waived or surrendered any right to have the determination of this cause confined to the questions at bar.

The record in this case shows that the statute of Kansas in question in the case before this court was attacked solely on the allegation that it was an invalid imposition upon domestic railway corporations in taxing the whole of their capital stock, and burdening the interstate commerce of such corporations, and, being unenforceable as to domestic railways, if applied to foreign railways would be in violation of contract obligations, and a denial of due process, and of equal protection of the law, in subjecting foreign corporations to liabilities not enforceable against domestic companies.

But the Chicago, Rock Island & Pacific Railway Company, *amicus curiæ*, urges upon the court the contention that the act imposes a burden directly upon the interstate commerce of foreign railway corporations, without respect to its effect on domestic companies, in requiring a tax upon the entire capital stock of foreign corporations, which is devoted to the conduct of both local and interstate business in Kansas. It is also contended that the commerce clause is violated by section 6 of the act, providing for cancellation of the license of foreign companies to do business in Kansas upon nonpayment of the required fee. Finally, it is urged that equal protection of the laws is denied to foreign railways, in that domestic corporations are taxed upon their "paid-up" capital stock, and foreign companies upon their "issued" capital stock.

The brief of the Rock Island company is confined to a discusion of the three issues set out above, none of which were raised by the receivers of the Frisco company in the court below, and none of which are submitted in the record in this court in the case at bar. Defendant in error believes that this court should welcome a free and full discussion by all parties interested of all questions now before the court, but urges that the argument should have been confined to the issues found in the record.

Not waiving the request that this brief of the Chicago, Rock Island & Pacific Railway Company be not considered, except so far as applicable to the issues properly before the court, defendant in error will discuss the contentions of this company so far as seems necessary or proper.

Under the construction of the statute in question, given by the supreme court of Kansas, there is no burden upon the interstate commerce of foreign railway corporations.

Two principles of law relative to the construction of statutes are so well settled as to require no exposition. These are that an ambiguous statute should be so construed, if possible, as to reconcile it with all constitutional requirements, and that the administrative construction of a state statute by the courts of the state are binding upon this court.

In a case involving this statute, the supreme court of Kansas construed the statute with reference to the manner in

"1. CORPORATIONS — *Filing Annual Statements — Paying Annual Dues—Statute Applies Only to Corporations Doing Intrastate Business.* The provisions of the corporation act of 1913 requiring a foreign corporation to file annual statements and to pay an annual fee, as a condition to doing business in this state, do not apply to corporations engaged solely in interstate commerce, and as to corporations engaged in both local and interstate business they relate only to the conditions upon which intrastate business may be done.

"2. SAME. The tax required by that act to be paid by a foreign corporation for the privilege of doing an intrastate business is a percentage of the proportion of its capital stock devoted to that part of its business."

"3. FOREIGN RAILWAY CORPORATION ENGAGED IN BOTH LOCAL AND INTERSTATE COMMERCE—*How Taxable.* A foreign railway corporation engaged in both local and interstate commerce may be required to pay a state tax upon the privilege of doing an intrastate business, based upon the proportion of its total capital stock which is devoted to that purpose."

In the opinion the court said:

"The Chicago, Rock Island & Pacific Railway Company contends that as to it and other foreign corporations doing both a local and an interstate business, the act is void because it undertakes to regulate interstate commerce. If it were given a strictly literal construction it might be open to that objection. It requires the payment of a fee which manifestly is intended as a tax upon the right of foreign corporations to do business in this state. It does not in so many words make any distinction between those which are and those which are not engaged in interstate commerce. But it was adopted after the cases of Buck Stove Co. v. Vickers, 226 U. S. 205, and Western Union Tel. Co. v. Kansas, 216 U. S. 1, had been decided. It was drawn and passed with full understanding that the state can not impose any restraint whatever on the right of a carrier incorporated elsewhere to do an interstate business here, and can not require of it, as a condition to doing a purely local business, the payment of a percentage of its capital invested in business elsewhere or in interstate commerce. The legislature in this new enactment obviously undertook to tax the right of a foreign corporation to do intrastate business, and to fix the amount according to the capital invested in that business, not as denoting the value of the right conferred by the state in this regard, but as bearing the same relation thereto that the total capital of a domestic company does to the value of its corporate franchise, and as indicating the relative value of the privilege

enjoyed by the different concerns in this regard. The requirements of the statute are imposed on such foreign corporations doing business in this state as are '*subject to compliance with the laws relating to the admission of foreign corporations to do business in Kansas.*' (§ 2.) Corporations which are engaged solely in interstate commerce are therefore wholly exempt from all its provisions, and those which do both an interstate and an intrastate business are exempt so far as concerns the former. The phrases 'that proportion of such foreign corporation's issued capital stock as is devoted to its Kansas business' (§ 2), and 'the issued capital stock used in Kansas,' refer to the amount of capital invested in doing a purely local business. The total capital of the company is involved only as a basis for arriving at a reasonable estimate of the capital devoted to transportation originating and ending in Kansas."

State, *ex rel.*, v. Sessions, 95 Kan. 272.

This opinion is not contained in the record before this court. The receivers of the Frisco company did not urge the same question before the supreme court of Kansas, and the case at bar is an appeal from another decision of the supreme court of Kansas, given at the same time.

The plaintiffs in error in this case, receivers of the St. Louis & San Francisco Railway Company, concede in their brief that under the authority of Western Union Telegraph Company v. Kansas, 216 U. S. 1, and Pullman Company v. Kansas, 216 U. S. 56, the act in question is valid as to foreign railway corporations, and it seems to defendant in error that the act in question was drawn with the express purpose and that it accomplished that express purpose of avoiding the objections to the statute which was condemned by this court in the Western Union and Pullman cases. However, the Rock Island company still urges the Western Union and Pullman cases as authority for its objection to the validity of the law.

The recent case of St. Louis S. W. Ry. Co. v. Arkansas, 235 U. S. 350, seems conclusive on the present question. In that case this court approved a statute of Arkansas very similar in its provisions to the Kansas law, and which was attacked on the same grounds. In the statement of the case by Mr. Justice Pitney, it is said:

"Act No. 112 provides for what are called 'annual franchise taxes' on corporations doing business in the state. The first three sections refer to domestic corporations doing business for profit. Sections 4 and 5 require each foreign corporation

for profit doing business in the state, and owning or using a part or all of its capital or plant in the state, to make an annual return to the Tax Commission, showing, among other things, the total amount of its capital stock, and the market value of the same, and the value of property owned and used by it, within and without the state respectively. Section 7 provides that the commission, from the facts thus reported, and any other facts bearing upon the question, shall determine 'the proportion of the authorized capital stock of the company represented by its property and business in this state,' and shall report the same to the auditor, who shall charge and certify to the treasurer for collection annually from such company, 'in addition to the initial fee otherwise provided by law, for the privilege of exercising its franchise in this state, one-twentieth of one per cent each year thereafter upon the proportion of the outstanding capital stock of the corporation represented by property owned and used in business transacted in this state.' Section 12 requires the attorney-general to collect the tax, with an added penalty for delinquency in payment, by suit to be brought in the name of the state. By § 14 the tax and penalty are made a first lien upon all property of the corporation. By § 15 if a corporation 'organized under the laws of Arkansas or any foreign country authorized to do business in this state for profit' fails or neglects to make the report or pay the tax prescribed for thirty days after the expiration of the time limited by the act, and the default is willful and intentional, an action may be brought by the attorney-general or prosecuting attorney to forfeit and annul the charter of the corporation, and 'if the court is satisfied that such default is willful and intentional it shall revoke and annul such charter.' By § 20, when any corporation shall have paid the franchise tax prescribed by the act, the Tax Commission, or the secretary of state if the commission be abolished, is required to issue to it a certificate authorizing it to do business in the state for the term of five years, upon condition that it pay annually the franchise tax prescribed by the act, and such certificate is made evidence in all the courts of the state of the right of the corporation to do business in the state during the term of the certificate. And, 'In case any corporation shall fail to pay the franchise tax prescribed by this act when it becomes due during the term of said certificate, the said Tax Commission shall cancel said certificate, and said corporation shall forfeit its right to do business in this state, in addition to the other penalties prescribed in this act.' "

The supreme court of Arkansas (106 Ark. 326) held that this statute required a fee based only upon capital used in

intrastate property and business, and upheld the law as a valid license tax. That court said:

"Our state has fixed a franchise tax based solely 'upon the proportion of outstanding capital stock of corporations represented by property owned and used in business transacted in this state.' The act in question seems to have been drawn with great care, and with the evident purpose to exclude any contention that the tax was made upon interstate commerce. The framers of the act evidently considered the cases of Ludwig v. West. Un. Tel. Co., 216 U. S. 146, and West. Un. Tel. Co. v. Kansas, 216 U. S. 1, and therefore intended to pass an act that would not be contrary to the principles therein announced."

In the opinion of this court Mr. Justice Pitney said:

"Upon the mere question of construction we are of course concluded by the decision of the state court of last resort. But when the question is whether a tax imposed by a state deprives a party of rights secured by the federal constitution, the decision is not dependent upon the form in which the taxing scheme is cast, nor upon the characterization of that scheme as adopted by the state court. We must regard the substance, rather than the form, and the controlling test is to be found in the operation and effect of the law as applied and enforced by the state.

"We therefore accept the construction of act No. 112, that we have quoted from the opinion of the state court, which is, in short, that it imposes an annual franchise tax upon the right to exist as a corporation or to exercise corporate powers within the state, the amount of the tax being fixed solely by reference to the property of the corporation that is within the state and used in business transacted within the state, and excluding any imposition upon or interference with interstate commerce. By this we understand that the franchise of a foreign corporation that is intended to be taxed is that which relates solely to intrastate business.

"And we proceed to consider whether, in view of the construction thus placed upon act No. 112, the franchise tax imposed upon plaintiff in error pursuant to its terms runs counter to the commerce clause or the fourteenth amendment.

"The tax, as will be observed, is not in any wise based upon the receipts of the railroad company from interstate commerce, either taken alone or in connection with the receipts from its intrastate business. Since, therefore, the amount of the imposition is not made to fluctuate with the volume or the value of the business done, we are relieved from those difficulties that arise where state taxes are based upon the earnings of interstate carriers, as in Maine v. Grand Trunk Ry., 142 U. S. 217; Wisconsin & Michigan Ry. v. Powers, 191 U. S. 379;

Galveston, Harrisburg & San Antonio Ry. v. Texas, 210 U. S. 217; Oklahoma v. Wells, Fargo & Co., 223 U. S. 298; and U. S. Express Co. v. Minnesota, 223 U. S. 335.

"And we have no hesitation in overruling the contention that the tax is repugnant to the 'due process' clause on the ground of being in effect based on property located beyond the limits of the state, as in Western Union Tel. Co. v. Kansas, 216 U. S. 1, 30; and in Ludwig v. West. Un. Tel. Co., 216 U. S. 146, 162; for this tax is measured by reference to property situate wholly within the confines of the state.

"So far as the commerce clause is concerned, it seems to us that the principles upon whose application the present decision must depend are those set forth in Postal Tel. Cable Co. v. Adams, 155 U. S. 688, 695, where the court, by Mr. Chief Justice Fuller, said: 'It is settled that where by way of duties laid on the transportation of the subjects of interstate commerce, or on the receipts derived therefrom, or on the occupation or business of carrying it on, a tax is levied by a state on interstate commerce, such taxation amounts to a regulation of such commerce and can not be sustained. But property in a state belonging to a corporation, whether foreign or domestic, engaged in foreign or interstate commerce, may be taxed, or a tax may be imposed on the corporation on account of its property within a state, and may take the form of a tax for the privilege of exercising its franchises within the state, if the ascertainment of the amount is made dependent in fact on the value of its property situated within the state (the exaction, therefore, not being susceptible of exceeding the sum which might be leviable directly thereon), and if payment be not made a condition precedent to the right to carry on the business, but its enforcement left to the ordinary means devised for the collection of taxes.'

"So, in Atlantic &c. Tel. Co. v. Philadelphia, 190 U. S. 160, the court, reviewing numerous previous cases, laid down certain propositions as well established, and among them the following: (*a*) No state can compel a party, individual, or corporation to pay for the privilege of engaging in interstate commerce; (*b*) This immunity does not prevent a state from imposing ordinary property taxes upon property having a situs within its territory, although it be employed in interstate commerce; and (*c*) The franchise of a corporation, although that franchise is the business of interstate commerce, is, as a part of its property, subject to state taxation, provided at least the franchise is not derived from the United States.

"Applying these principles, we have no difficulty in sustaining the tax in question as a legitimate imposition upon a foreign corporation with respect to its exercise of the privilege of transacting intrastate business in corporate form, the tax being based upon the amount and value of its property within

the state. It is fixed at a definite percentage (1/20 of one per cent) of 'the proportion of the outstanding capital stock of the corporation represented by property owned and used in business transacted in this state,' and the act provides machinery for ascertaining the market value of the entire capital stock and striking a proportion between the value of the property owned and used by the corporation in the state and that owned and used by it outside of the state. In its essence the tax is not distinguishable from that which was sustained by this court in Western Union Tel. Co. v. Massachusetts, 125 U. S. 530, and in another case between the same parties, 141 U. S. 40. See also Pittsburgh &c. Ry. v. Backus, 154 U. S. 421, 430, 435; Indianapolis &c. R. R. v. Backus, 154 U. S. 438; Cleveland &c. Ry. v. Backus, 154 U. S. 439, 444, 445; Western Union Telegraph Co. v. Taggart, 163 U. S. 1, 18; Western Union Tel. Co. v. Gottlieb, 190 U. S. 412, 424."

In the light of the above decisions, the Kansas statute should be examined with reference to similarity of its provisions with the Arkansas law. In the above statement of the Arkansas case it is said:

"Sections 4 and 5 require each foreign corporation for profit doing business in the state, and owning or using a part or all of its capital or plant in the state, to make an annual return to the Tax Commission, showing among other things the total amount of its capital stock, the market value of the same, and the value of property owned and used by it, within and without the state respectively. Section 6 provides that the commission, from the facts thus reported and any other facts bearing upon the question, shall determine 'the proportion of the authorized capital stock of the company represented by its property and business in this state,' and shall report the same to the auditor, who shall charge and certify to the treasurer for collection annually from such company, 'in addition to the initial fee otherwise provided by law, for the privilege of exercising its franchise in this state, one-twentieth of one per cent each year thereafter upon the proportion of the outstanding capital stock of the corporation represented by property owned and used in business transacted in this state."

The Kansas act, chapter 135, Laws of 1913, section 2. requires a similar report from foreign corporations, and provides:

"Upon the filing of such report the secretary of state, from the facts thus reported and any other facts coming to his knowledge bearing upon the question, shall determine the proportion of the issued capital stock of the company represented by its property and business in Kansas, and shall charge and

collect from such company, in addition to the initial fees, for the privilege of exercising its franchise in Kansas, an annual fee upon that proportion of such foreign corporation's issued capital stock as is devoted to its Kansas business, and to be not less than ten dollars in any case, as follows: When the issued capital stock of the corporation used in Kansas does not exceed ten thousand dollars such annual fee shall be ten dollars; when the issued capital stock used in Kansas exceeds ten thousand dollars but does not exceed twenty-five thousand dollars, the annual fee shall be twenty-five dollars; when the issued capital stock used in Kansas exceeds five million dollars, the annual fee shall be two thousand and five hundred dollars."

The supreme court of Kansas has held that this requires a report of and a fee based upon the capital devoted to intrastate business only, and its interpretation should be binding upon this court and its decision approved.

It is argued in the brief of the Rock Island company that the report required by section 2 might be construed as requiring a fee based upon interstate capital and business, but nowhere is it urged that such interpretation was placed upon this section by the secretary of state. It is not contended by this railway company in this brief, nor was it contended before the supreme court of Kansas, that the company was required to pay a fee based upon interstate capital or interstate business, nor was it alleged that the twenty-five hundred dollar fee which was paid by the Rock Island company was in excess of a fee properly proportioned upon the intrastate capital and business of the corporation. Moreover, as pointed out by the Kansas supreme court, section 8 of the act provides for an appeal from the secretary of state upon his determination of the amount of the fee, and nowhere does it appear that such appeal was taken. The Kansas supreme court said:

"The Rock Island company insists that notwithstanding the construction adopted, the taxing officers may, so far as the pleadings show, have proceeded on the theory that by 'business in Kansas' was meant all business transacted here, interstate as well as local. The presumption, however, is that the officers acted lawfully. Moreover, an appeal is provided from the determination of the secretary of state fixing the fee (Laws 1913, ch. 135, § 8), and unless this statutory remedy is pursued (and the pleadings show inferentially at least that it has not been) the amount can not be questioned (37 Cyc. 1079).

The State v. Sessions, 95 Kan. 272.

The Rock Island Railway Company is really submitting a moot question to this court, and one that is not properly justiciable herein.

In Pullman Company v. Knott (October 2, 1914), 35 Sup. Ct. Rep. 2, 235 U. S. 23, it was held, as stated in the headnote in the official report, that a state tax will not be upset upon hypothetical or unreal possibilities, if good upon the facts as they are. In this case the Pullman company attacked a taxing statute of Florida as discriminatory because the tax was confined to sleeping- and parlor-car companies, and did not fall upon railroads operating their own sleeping and parlor cars. Mr. Justice Holmes dismissed this objection on the ground that it did not appear that any railroad in Florida did operate its own sleeping or parlor cars.

In McCabe *et al.* v. Atchison, Topeka and Santa Fe Ry. Co., 35 Sup. Ct. Rep. 69, 235 U. S. 151, involving the "Jim Crow" law of Oklahoma, injunctive relief was denied by this court because none of the complainants alleged that he had ever traveled or requested transportation over any of the defendant railway lines, or that he had ever been refused accommodations equal to those furnished other persons.

There is nothing in the record before the court, nor in the brief of the Rock Island Railway Company, nor in the answer of the Rock Island Railway Company to the mandamus suit before the Kansas supreme court, which indicates that its interstate commerce was in fact burdened by the operation of the statute in question.

The Rock Island company also contends that the commerce clause of the constitution is violated by section 6 of the act, providing for a cancellation of the license of foreign companies to do business in Kansas upon nonpayment of the required fee. The statute provides "a forfeiture of its right or authority to do business in this state." As was held in the Western Union and Pullman cases, no foreign corporation needs a license from the state to engage in interstate business. The only right or privilege which a foreign corporation obtains from the state of Kansas is that of doing an intrastate business, and of course that is the only right or privilege which the state can take away upon failure to comply with the provisions of its laws. By a forfeiture of the right to do an intrastate business the corporation is not barred from the privilege of transacting an

interstate business, and there is manifestly no violation of the commerce clause in the operation of section 6 of the act.

In the case involving the Arkansas statute, *supra*, the same objection was urged against section 20 of the act, and upon that question Mr. Justice Pitney said:

"It does not seem to us that § 20, when taken in connection with the context, requires to be so construed as to interfere with interstate commerce. The taxing provisions of the act apply to all corporations doing business in the state for profit, whether organized under its laws, or under the laws of other states, or of foreign countries, and entirely irrespective of the question whether they are engaged in commerce. Therefore, it was natural that, in such a provision as is contained in § 20, language having upon its face a general scope should be adopted; but it need not be indiscriminately applied to all the several corporations that are subject to the act. The forfeiture in terms is of 'the right of such corporation to do business in this state.' This does not necessarily include the right to transact business that is done partly within and partly without the state. The section does not call for an annulment of the charter. That topic is covered by § 15 of the same act, which applies, however, only to corporations organized under the laws of Arkansas or of foreign countries, and not to corporations of other states, to which class plaintiff in error belongs.

"In view of these considerations, we ought to assume, until the state, through its judicial or administrative officers, places a different construction upon the act, that § 20 will be limited in its operation to forfeiting for nonpayment of the franchise tax only the privilege of doing intrastate business; or else that the section, being void for unconstitutionality, will be treated as severable from the other provisions of the act."

The last objection of the Rock Island company to the statute in question is that domestic corporations are taxed upon their "paid up capital stock," and foreign corporations are taxed upon their "issued capital stock."

There is involved here no question of a tax upon capital stock. The only question involved is as to the right of the state to impose a charge upon the exercise by a foreign corporation of its franchises within the state. The amount of this charge is fixed in part with reference to the stock of the corporation affected, but this is only a mode of fixing the amount of the charge and "is not the subject of judicial inquiry in a federal tribunal."

Home Insurance Co. v. New York, 134 U. S. 594.

Defendant in error again reiterates that this objection to the statute is not found in any record before this court, nor was it alleged or urged by the Rock Island company before the supreme court of Kansas. Such an objection was set up in the pleadings in another case, by another corporation, not a railroad company, which is not appealing from a decision of the state court; and in the absence of any record setting forth proper grounds for entertaining such an objection to the statute, this court should not consider it. Moreover, it is not alleged by the Rock Island company that its issued capital stock is not paid up, or that any discrimination has been worked against it by such a phrasing of the statute. This is another moot question. The supreme court of Kansas said, relative to this objection:

"A further contention is that the statute makes an unwarrantable discrimination between domestic and foreign corporations, basing the fee of the former upon the 'paid-up' capital stock, and that of the latter on the 'issued' capital stock. The phrase 'issued capital stock' is used in distinction from authorized capital stock, and manifestly can refer only to the actual investment, because the fee is regulated by the proportion of the issued stock that is 'devoted to its Kansas business' —'used in Kansas.' "

The State, *ex rel.*, v. Sessions, 95 Kan. 272, 277.

Chapter 135, Laws of Kansas, 1913, imposes a franchise tax upon domestic corporations for the privilege of existence as Kansas corporations, and imposes a tax upon foreign corporations for the privilege of exercising their franchises in Kansas. As to foreign corporations, the tax is measured by the amount of capital of the company employed in exercising its franchise in Kansas, that is devoted to its property and business in Kansas. The supreme court of Kansas has determined that this requires a tax upon the exercise of a franchise, the amount of which tax depends only upon property and capital employed in intrastate business, and this court has already approved and followed a similar construction of a similar statute enacted by the state of Arkansas.

None of the objections as to the constitutionality of the statute which have been urged in the brief of the Chicago, Rock Island & Pacific Railway Company, appearing *amicus curiæ*, are based upon the record now before this court, upon which this case is submitted. The last objection urged by the

Rock Island Railway Company has never been submitted to the supreme court of Kansas by the Rock Island Railway Company, or by any other corporation engaged in interstate commerce. The first objection of the Rock Island Railway Company, to the effect that the interstate commerce of foreign railways is directly burdened by this act, seems to be groundless under the authority of the Western Union and Pullman cases and St. Louis S. W. R. R. Co. v. Arkansas. The second objection, predicated upon the forfeiture provided in section 6 of the act, is unavailing, for the reason that that section provides only a forfeiture of the right to do local intrastate business. Even if section 6 be held violative of the commerce clause, it is severable from the rest of the act, and the validity of the tax disputed should be upheld, regardless of this court's determination upon the right of the state to make the forfeiture provided in section 6.

Respectfully submitted.

S. M. BREWSTER,
Attorney-general,

JAS. P. COLEMAN,
Attorneys for Defendant in Error.

W. P. MONTGOMERY,
JOHN L. HUNT,
Of Counsel.

26

In the Supreme Court
OF THE
United States.

OCTOBER TERM 1915.

No. 451.

JAMES W. LUSK, WILLIAM C. NIXON AND WILLIAM B. BIDDLE, RECEIVERS OF THE RAILROADS AND PROPERTY OF ST. LOUIS AND SAN FRANCISCO RAILROAD COMPANY,

Plaintiffs in Error,

vs.

J. T. BOTKIN, SECRETARY OF STATE OF THE STATE OF KANSAS,

Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

BRIEF OF THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY AS AMICUS CURIÆ.

PAUL E. WALKER,
Attorney for The Chicago, Rock Island and Pacific Railway Company.

CRANE & CO., TOPEKA

INDEX OF CASES.

In the Supreme Court

OF THE

United States.

OCTOBER TERM 1915.

JAMES W. LUSK, WILLIAM C. NIXON AND WILLIAM B. BIDDLE, RECEIVERS OF THE RAILROADS AND PROPERTY OF ST. LOUIS AND SAN FRANCISCO RAILROAD COMPANY,
Plaintiffs in Error,

vs.

J. T. BOTKIN, SECRETARY OF STATE OF THE STATE OF KANSAS,
Defendant in Error.

No. 451.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

BRIEF OF THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY AS AMICUS CURIÆ.

STATEMENT.

The Chicago, Rock Island & Pacific Railway Company is the plaintiff in error in case No. 531, October Term 1915, pending in this Court, which controversy involves the constitutionality of the statute considered in the above entitled cause.

The Chicago, Rock Island and Pacific Railway Company has, under protest, paid to the Secretary of State of the State of Kansas an annual tax of $2500 for the year 1913, a similar tax for the year 1914, and it will be required, shortly, to pay a like tax for the year 1915. The same situation exists with respect to other railway companies having similar cases in this Court on writs of error. The amount of the tax, so far as railway companies are concerned, and its annual assessment, result in the imposition of a burden upon such companies so extensive as to make its payment a serious consideration, and which would become so burdensome if generally adopted by the several states as to make the question of its legality of much importance.

So far as foreign corporations are concerned, the act, Chapter 135, Laws of Kansas 1913, imposes a tax upon the entire capital stock of such corporations which is devoted to the conduct of both intrastate and its interstate business within the state of Kansas. A failure of a foreign railway corporation to pay the tax results in a denial by the State of Kansas of the right of such corporations to do any business of any character within the State. The tax is not imposed as a property

tax, nor as a tax for the privilege of doing business in a corporate capacity, as other laws of Kansas tax the property of foreign corporations and still others provide for fees, whose payment is prerequisite to their right to do business as corporate bodies within the State of Kansas. The tax, so far as foreign corporations are concerned, is imposed "for the privilege of exercising its franchise in Kansas,"—for the privilege of doing business, intrastate or interstate, within the State of Kansas.

BRIEF AND ARGUMENT.

THE EXPLICIT TERMS OF THE STATUTE AND THE CONSTRUCTION PLACED UPON IT BY THE STATE OF KANSAS IMPOSE A DIRECT AND SUBSTANTIAL BURDEN UPON THE INTERSTATE BUSINESS OF FOREIGN RAILWAY CORPORATIONS DOING BUSINESS WITHIN THE STATE OF KANSAS.

There can be no contention from the language of the statute that it imposes a property tax. If it were a property tax it would be void under the provision of the Kansas Constitution, providing that "the legislature shall provide for a uniform and equal rate of assessment and taxation." Section 1, Article 2, Constitution State of Kansas. *Hines v. Leavenworth*, 3 Kan. 186, 200; *Missouri River, etc., R. Co. v. Morris*, 7 Kan. 210, 222; *In re* page 60 Kan. 842, 846.

In the brief of the State it is said, page 3, "This is patently not a property or *ad valorem* tax, nor is it in lieu of any property tax." Its validity, therefore, must be determined by whether the tax can be imposed as a license tax. In the language of Mr. Justice HOLMES in *Pullman Co. v.*

Knott, Comptroller of the State of Florida, 235 U. S. 23, 26:

> "The tax to be valid must be either *ad valorem* or a license tax."

While it is true that the statement does not in terms require a corporation of another state engaged in interstate commerce to take out formally a license to transact its business in Kansas, yet it does deny all authority to do business in Kansas unless the corporation makes, delivers and files a statement of the kind required by the statute, accompanied by the fee demanded by the Secretary of State. The effect of this requirement is the same as if a formal license were required as a condition precedent to the right to do such interstate business.

It is apparent that the statute conditions the continuance of the right to do any business, intrastate or interstate, by a foreign railway company, upon the payment of the license demanded by the State. At no place does the statute separate intrastate and interstate business, but treats the doing of an entire business as the privilege conferred. Section 6 of the act provides that a failure on the part of a foreign corporation to file the statement provided for by the act and accompanied

by the fee demanded by the Secretary of State "shall work a forfeiture of its right or authority to do business in this State, and the Charter Board may at any time thereafter declare such forfeiture, and shall forthwith publish such declaration in the official state paper." In the brief of the State, page 2, it is conceded that the act "authorizes the forfeiture of the charter of domestic corporations and the licenses of foreign corporations for nonpayment of annual fees."

This court in *International Text Book Co. v. Pigg*, 217 U. S. 91, and *Buck Stove Co. v. Vickers*, 226 U. S. 205, held that a similar provision of the statute, of which the act in question is but amendatory in minor details, applied to the conduct of the interstate business of foreign corporations.

The statute is general in its terms and makes no distinction between the intrastate and interstate commerce of foreign railway companies, and the fact that the State might lawfully tax its purely intrastate transactions, cannot have the effect of curing the defect in the present statute. In the language of Mr. Justice STRONG in case of *The State Freight Tax*, 15 Wall. 232:

> "The state may tax its internal commerce, but if an act to tax interstate or foreign com-

merce is unconstitutional it is not cured by including in its provisions subjects within the jurisdiction of the state."

And in *Phila. Steamship Co. v. Pennsylvania*, 122 U. S. 326, 340, this Court held that the fact that a statute was general in its terms and made no discrimination against interstate or foreign commerce does not relieve the statute from its objectionable character. The tax affects the whole business of foreign railway corporations without discrimination, and the fact that there may be within the statute elements within the taxing power of the state will not serve to render the act less invalid as a whole. *Leloup v. Port of Mobile*, 127 U. S. 640; *Williams v. City of Talladega*, 226 U. S. 404, 419.

The requirement of the statute that before a foreign railway company may continue to do either intrastate or interstate business within the State of Kansas, it must file a designated statement with the Secretary of State accompanied by a substantial and burdensome fee, is a regulation of interstate commerce, and void.

In view of former litigation in this Court, it may be well to notice certain prior provisions of the Kansas statutes. Section 1283 of the General

Statutes of Kansas, 1901 (Appendix, a), provides in substance that both domestic and foreign corporations shall file a statement containing designated information with the Secretary of State, and provides that as to both such classes of corporations, a failure shall work a forfeiture of their right to do business in the State. Subsequently, by the Laws of Kansas, 1907, Chapter 140, the laws relating to private corporations were recodified, and Section 1283 and its accompanying sections were modified in certain minor particulars and re-enacted. Section 1283 became Section 29 of Chapter 140 of the Laws of 1907, and Section 1726 of the General Statutes of Kansas, 1909. (Appendix, b.)

Chapter 135 of the Laws of Kansas for 1913, the act in question, amended and repealed Section 1726 of the General Statutes of Kansas, 1909, and the only substantial change that the act in question made in Section 1726 was to advance the filing fee from from one dollar to twenty-five hundred dollars, so far as this Railway Company is concerned, and to make the statute apply to railroad corporations to which it had not previously referred.

In the case of *International Text Book Co. v.*

Pigg, 27 U. S. 91, this court held that Section 1283 of the General Statutes of 1901, which is similar, as pointed out, in all respects to the provisions of the act in question, except the amount of the fee imposed, was unconstitutional and void as a direct regulation of the interstate commerce of foreign corporations, and it is submitted that the rule of that case should be applied here to an identical situation. In that case an action was brought in Kansas by a foreign corporation to recover a debt incurred in Kansas. The plaintiff was engaged in interstate business in Kansas and the debt in question accrued out of such business. The defense was that by reason of the plaintiff's failure to file with the Secretary of State of the State of Kansas a statement required by the statutes of Kansas, it was not entitled to maintain the action in a court of Kansas. This Court called attention to the fact that Section 1283 of the General Statutes of Kansas 1901, provided that a foreign corporation should file an annual statement setting forth certain information, and that a failure to file such statement within the time required should work a forfeiture of its right or authority to do business within the State, and that no action should be maintained within

the State by such a corporation without first obtaining a certificate from the Secretary of State that the statements provided for had been properly made. The plaintiff in the case had not, before bringing the suit, filed with the Secretary of State the statement required by the statute. It must be borne in mind that the act in question is similar in all essential particulars with the section of the statute involved in the Pigg case, except, as pointed out, the statute in question imposes upon this Railway Company an additional burden of a fee of twenty-five hundred dollars which must accompany the statement. In holding that the Kansas statute was void, Mr. Justice HARLAN said:

> "In the first place, it is made a condition precedent to the authority of a corporation of another State, except banking, insurance and railroad corporations, to do business in Kansas, that it shall prepare, deliver and file with the Secretary of State a detailed 'Statement,' showing the amount of the authorized paid-up, par and market value of its capital stock, its assets and liabilities, a list of its stockholders, with their respective postoffice addresses and the shares held and paid for by each and the names and postoffice addresses of the officers, trustees, or directors and managers.

In the next place, the statute denies to the corporation doing business in Kansas the right to maintain an action in a Kansas court, unless it shall first obtain a certificate of the Secretary of State to the effect that the 'Statement,' required by Sec. 1283, has been properly made. . . .

It is true that the statute does not, in terms, require the corporation of another State engaged in interstate commerce to take out what is technically 'a license' to transact its business in Kansas. But it denies all authority to do business in Kansas unless the corporation makes, delivers and files a 'Statement' of the kind mentioned in Sec. 1293. The effect of such requirement is practically the same as if a formal license was required as a condition precedent to the right to do such business. In either case it imposes a condition upon a corporation of another State seeking to do business in Kansas, which, in the case of interstate business, is a regulation of interstate commerce and directly burdens such commerce. The State cannot thus burden interstate commerce. It follows that the particular clause of Sec. 1283 requiring that 'Statement' is illegal and void.

In this connection it is to be observed that by the statute the doors of Kansas courts are closed against the Textbook Company, unless it first obtains from the Secretary of State a certificate showing that the 'Statement' mentioned in Sec. 1283 has been properly made.

In other words, although the Textbook Company may have a valid contract with a citizen of Kansas, one directly arising out of and connected with its interstate business, the statute denies its right to invoke the authority of a Kansas court to enforce its provisions unless it does what we hold it was not, under the Constitution, bound to do, namely, make, deliver and file with the Secretary of State the 'Statement' required by Sec. 1283. If the State could, under any circumstances legally forbid its courts from taking jurisdiction of a suit brought by a corporation of another State, engaged in interstate business, upon a valid contract arising out of such business and made with it by a citizen of Kansas, it could not impose on the company, as a condition of its authority to carry on its interstate business, in Kansas, that it shall make, deliver and file that 'Statement' with the Secretary of State and obtain his certificate that it had been properly made. . . .

It is sufficient to say that the requirement of the 'Statement' mentioned in Sec. 1283 of the statute imposes a direct burden, upon the plaintiff's right to engage in interstate business, and, therefore, is in violation of its constitutional rights. It is the established doctrine of this Court that a State may not, in any form or under any guise, directly burden the prosecution of interstate business. But such a burden is imposed when the corporation of another State, lawfully engaged

> in interstate commerce, is required, as a condition of its right to prosecute its business in Kansas, to make and file a 'Statement' setting forth facts which the State, confessedly, could not control by legislation. It results that the provision as to the 'Statement' mentioned in Sec. 1283 must fall before the Constitution of the United States, and with it—according to the established rules of statutory construction—must fall that part of the same section which provides that the obtaining of the certificate of the Secretary of State that such 'Statement' has been properly made shall be a condition precedent to the right of the plaintiff to maintain an action in the courts of Kansas. Section 1283, looking at the object for which it was enacted, must be regarded as an entirety. These parts of the statute are so connected with and dependent upon each other that the clause relating to actions brought in the courts of Kansas cannot be separated from the prior clause in the same section referring to the 'Statement' to be filed with the Secretary of State, and the former left in force after the latter is stricken down as invalid."

The same statute was again held invalid by this court in *Buck Stove Co. v. Vickers*, 226 U. S. 205, on the ground that it was a burden upon interstate commerce.

The Supreme Court of Kansas (*State v. Sessions*,

95 Kan. 272, 274) admits that the statute would impose a direct and invalid burden on interstate commerce, so far as railway corporations are concerned, "if it were given a strictly literal construction." Continuing, that Court says:

> "It requires the payment of a fee which manifestly is intended as a tax upon the right of foreign corporations to do business in this State. It does not in so many words make any distinction between those which are and those which are not engaged in interstate commerce."

But it is argued that since it was adopted after the decisions of this Court in *Western Union Tel. Co. v. Kansas*, 216 U. S. 1, and *Buck Stove Co. v. Vickers*, 226 U. S. 205, it should be assumed that the legislature was dealing with the control of intrastate commerce only. By this reasoning it would be impossible for any legislature to pass an invalid act. If legislative enactment is to be construed by what should have or might have been done, and what has been done ignored, then courts will have assumed exclusive legislative powers. The identical argument was advanced by the Supreme Court of Kansas in *State of Kansas v. Western Union Tel. Co.*, 75 Kan. 609, in sustaining an accompanying section of the Kansas

corporation statutes, which reasoning was expressly repudiated by this Court in *Western Union Tel. Co. v. Kansas*, 216 U. S. 1, saying:

> "But it is said that none of the authorities cited are pertinent to the present case, because the State expressly disclaims any purpose by the statute in question to obstruct or embarrass interstate commerce, but seeks only to prevent the Telegraph Company from entering the field of domestic business in Kansas without its consent and without conforming to the requirements of its statute. But the disavowal by the State of any purpose to burden interstate commerce cannot conclude the question as to the fact of such a burden being imposed, or as to the unconstitutionality of the statute as shown by its necessary operation upon interstate commerce. If the statute, reasonably interpreted either directly or by its necessary operation, burdens interstate commerce, it must be adjudged to be invalid, whatever may have been the purpose for which it was enacted, and although the company may do both interstate and local business. This court has repeatedly adjudged that in all such matters the judiciary will not regard mere forms, but will look through forms to the substance of things. Such is an established rule of constitutional construction as the adjudged cases abundantly show."

The Kansas Court argues that interstate commerce should be excluded from the act because it refers only to those foreign corporations which are "subject to compliance with the laws relating to the admission of foreign corporations to do business in Kansas," and that the Kansas statutes generally will be considered as having no control over foreign corporations engaged in interstate commerce. The facts do not warrant this conclusion, as the Kansas statutes deal comprehensively with all foreign corporations alike whatever their business and without regard to their business. Every foreign corporation must make application to the Charter Board giving a comprehensive statement of its business, and condition, and furnishing an agreement respecting the service of process. (Section 1710, Gen. Stat. of Kan. 1909.) The Charter Board is given authority to grant the permission to a foreign corporation if it meets certain conditions in its opinion and upon payment of the fees provided by statute, or to withhold its consent. (Section 1712, Gen. Stat. of Kan. 1909.) Foreign corporations desiring to do business of any kind in Kansas must pay an "application fee," a "filing and recording fee" and a "capitalization fee," which is based

on its total authorized capital stock. (Sections 1718, 1719, 1720, Gen. Stat. of Kan. 1909.) It will thus be seen that the State of Kansas does bring foreign railway corporations engaged in interstate commerce within the terms of its laws regulating the admission of foreign corporations generally and imposes upon them a fee based on the total amount of their capital stock devoted to intrastate and interstate commerce. The premise upon which the Kansas Supreme Court bases its supposed distinction is without existence.

As a matter of fact the Kansas Supreme Court itself has held that foreign corporations *although engaged exclusively in interstate commerce* must comply with and are in all respects subject to compliance with the laws relating to the admission of foreign corporations to do business in Kansas. *Vickers v. Buck*, 70 Kan. 584; *Buck v. Vickers*, 80 Kan. 29, 34; *State of Kansas v. Western Union Tel. Co.*, 75 Kan. 609. And it is well to remember that in the above cases the Supreme Court of Kansas was construing a statute of which the act in question is amendatory and which changes the substantial requirements thereof only by increasing the fee. These other Kansas statutes which the Supreme Court of Kansas now suggests

are not applicable to corporations engaged in interstate commerce, were held by that Court to apply to such corporations although engaged exclusively in interstate commerce, and on appeal to this Court it was held that such statutes did apply to interstate commerce, and that, therefore, they were unconstitutional and void as an improper regulation of interstate commerce. *International Textbook Co. v. Pigg*, 217 U. S. 91; *Buck Stove Co. v. Vickers*, 226 U. S. 205.

The Kansas Supreme Court next states that the provisions of the act in question respecting capital stock, "refer to the amount of capital invested in doing a purely local business." This argument is directly opposed to the mandatory provisions of the statute. By paragraph 9 of Section 6 of the act, foreign corporations are required to state "The value of the property owned and used by the company in Kansas, where situated, and the value of the property owned and used outside of Kansas and where situated." No other facts are required by the statute and from this information the Secretary of State, not may, but "shall determine the proportion of the issued capital stock of the company represented by its property and business in Kansas." By this mandatory process

the tax is levied upon the same proportion of the entire capital stock of a foreign corporation in relation to the entire capital stock as the total value of all the property of the corporation in Kansas bears to the total value of all of its property. Thus the value of the property of a foreign railway company which is largely devoted to interstate business in Kansas becomes the measure for the same relative amount of the capital stock which represents this value and this property. The language of the statute cannot be tortured into a direction to the Secretary of State to disregard the interstate business of a foreign corporation and the property and capital stock by which and through which it is conducted. "The issued capital stock used in Kansas," upon which the tax is directly based cannot, by any process of reasoning, mean anything but what it says. The capital stock used in Kansas means all of it that is used in Kansas, and since the amount used in Kansas is based upon the value of all the property in Kansas, devoted alike to intrastate and interstate business, it must follow that the stock used in Kansas represents the intrastate and interstate business of all foreign railway companies. The words, "business in Kansas" must be con-

strued in the same way as "property . . . in Kansas" with which they are connected. "Property," as commanded by the act means all property, and "business" must mean all business.

The words "in Kansas" qualifying "property and business" are of the same significance to both words. By the express direction of the statute "property" means the entire value of all the property owned and used in Kansas in the conduct of all of the business, intrastate and interstate, of foreign corporations. The same inclusive meaning must be given to the word "business." The word "business" as used in the statute means nothing more than the combined interest of a foreign corporation in Kansas. The only facts which are required to be furnished by a foreign corporation to the Secretary of State is the total value of its property in Kansas. "From the facts thus reported and any other facts coming to his knowledge bearing upon the question" the Secretary of State "shall determine the proportion of the issued capital stock of the company represented by its property and business in Kansas." The only other facts bearing upon the question must be the question as to the value of the corporation's property in and outside of Kansas, as this is the

only question which the statute permits the Secretary of State to consider. It would be an unconstitutional assumption of power for the Secretary of State to make an independent and secret investigation of any other facts in his opinion bearing upon the general question of the tax and upon a conclusion so reached, determine the amount of the tax to be assessed against a foreign corporation. *Interstate Commerce Commission v. Louisville & N. R. Co.*, 227 U. S. 88. Moreover, there is no way under the statute by which the Secretary of State could ascertain the amount of the Kansas intrastate business of a foreign railway company. Such figures are not kept by the railway companies operating in Kansas, the information is not furnished to the Public Utilities Commission, and the Attorney-General of Kansas in directing the Secretary of State ignored it. (Appendix, c.) The construction placed upon the statute by the Supreme Court of Kansas is not binding upon this Court, *United States Express Co. v. Minnesota*, 223 U. S. 335, 346, and should not be followed, as it is contrary to both the letter and the spirit of the act. It is said by the Supreme Court of Kansas that "the total capital of the company is involved only as a basis for arriving

at a reasonable estimate of the capital devoted to transportation originating and ending in Kansas." It will be noted that the statute, so far as foreign corporations are concerned, does not call for the value of the property owned and used by the company in Kansas in the conduct of its intrastate business, but on the contrary, calls for the total value of its property owned and used by the company in Kansas. Foreign railway companies in Kansas do not even report to the Public Utilities Commission the amount of their purely intrastate business in Kansas, so that there was no possible way, under the statute or otherwise, by which the Secretary of State of the State could have determined a reasonable estimate of the capital devoted to intrastate business of any foreign corporation, and the official direction given by the Attorney-General of Kansas to the Secretary of State precludes this idea, as he was directed to base the amount of the tax on the combined property or business of foreign railway companies. (Appendix, c.) The language of the statute precludes this construction, providing that if the statement, which has nothing to do with intrastate business or the property by which such business is conducted, but requiring, on the con-

trary a statement of the total value of the property owned and used by the company in Kansas as compared with the total value outside of Kansas, (Paragraph 9, Section 2) is not filed, accompanied by the fee designated by the act, such failure on the part of a foreign corporation "shall work a forefeiture of its right or authority to do business within this State." (Section 6.) The legislative intention is clearly shown by the provisions respecting domestic corporations. If a domestic corporation, although engaged in interstate commerce, fails to file the statement and pay the fee provided, the same shall "work the forfeiture of the charter of such corporation organized under the laws of this State, and the Charter Board may at any time thereafter declare the charter of such corporation forfeited; and upon the declaration of any such forfeiture it shall be the duty of the Attorney-General to apply to the district court of the proper county for the appointment of a receiver to close out the business of such corporation." (Section 6.) It is manifest, therefore, that the legislature intended that no corporation should do any business, intrastate or interstate, within the State of Kansas unless it filed the statement and paid the fee demanded. In designating

the rights given foreign corporations, after they have paid the tax, clearly shows the legislative intent, as it is provided that the Secretary of State shall impose the fee in question upon foreign corporations "for the privilege of exercising its franchise in Kansas." (Paragraph 11, Section 2.) The fee is not imposed for the privilege of exercising its right to do intrastate business in Kansas, but for the privilege of making any use of its franchise in Kansas; and in other words, for the privilege of doing any business in Kansas. Even the Supreme Court of Kansas admits this by saying: "It requires the payment of a fee which manifestly is intended as a tax upon the right of foreign corporations to do business in this State." In the brief filed on behalf of the State this construction of the act does not seem to be questioned, and it is not contended that the tax is valid on account of the purely intrastate business of foreign corporations, but it is insisted that "the State may impose a franchise tax upon the entire capital of the corporation—all of which is employed in exercise of the thing taxed, *i. e.*, the franchise, notwithstanding the corporation is engaged in interstate commerce, or that such commerce may be indirectly affected thereby." (Page

5.) It is assumed throughout the brief of the State that the State has the right to give, grant, or withhold a license to do business to foreign corporations, and that, therefore, the State may lawfully impose a tax on this privilege. But the authorities cited in the brief of the State do not meet the situation here.

Unless the tax is based upon the combined intrastate and interstate business of a foreign corporation, representing its entire property and business in Kansas, there is no basis provided by which the tax can be determined. The statute requires a foreign corporation to furnish the entire value of its property in Kansas devoted to its intrastate and its interstate business, and such combined value is alone furnished. The purely State business of a foreign corporation is not requested by the Secretary of State, nor is it furnished, and it can only be determined by special allocation, which has never been attempted by the Kansas railway companies. The tax, therefore, is of necessity calculated upon the basis of the combined intrastate and interstate property and business of a foreign corporation, and the vice of such a procedure cannot be removed simply by a State court saying that only intrastate commerce was

in the contemplation of the legislature. This Court will look through form to the substance, and where, as here, the necessary effect of the State is to burden interstate commerce it will be declared invalid, notwithstanding the fact that the State disclaims the intention to burden interstate commerce. *Brown v. Maryland*, 12 Wheat. 419; *Henderson v. Mayor of New York*, 92 U. S. 259, 268; *Muglar v. Kan.*, 123 U. S. 623, 661; *Home Insurance Co. v. New York*, 134 U. S. 594, 599; *Minnesota v. Barber*, 136 U. S. 313, 319, 326; *Galveston, H. & S. A. Ry. Co. v. Texas*, 210 U. S. 217, 227; *Western Union Tel. Co. v. Kan.*, 216 U. S. 1, 27.

Since the statute requires that a foreign corporation doing both intrastate and interstate business return the entire value of its property owned and used in such business within the State of Kansas, the taxing fee of the statute cannot be construed as relating only to property owned and used in intrastate commerce and sustained separately in that respect. *Oklahoma v. Wells Fargo & Co.*, 223 U. S. 298.

Even if it could be said that the fee imposed was for the privilege of doing *intrastate* business in Kansas, the situation could not be distinguished

from that which arose in *Western Union Tel. Co. v. Kansas*, 216 U. S. 1, 30, 32, 33, 44, 45, 47. There a statute of Kansas was under consideration, which provided, among other things, as construed by the Charter Board, that before a foreign corporation should have authority to do *intrastate* business in Kansas it should pay to the State a charter fee based on a certain percentage of its authorized capital stock. The Charter Board approved the application of the Western Union Company, but provided that it should not do *intrastate* business in Kansas until it had paid the fee, but that this restriction should not prevent the company from transacting *interstate* business. Mr. Justice HARLAN held that the statute requiring the payment of a given per cent of the authorized capital stock of a foreign corporation as a condition of its right to continue to do domestic business in Kansas, was a regulation which directly burdened interstate commerce, saying:

> "We are aware of no decision by this Court holding that a State may, by any device or in any way, whether by a license tax, in the form of a 'fee,' or otherwise, burden the interstate business of a corporation of another State, although the State may tax the corporation's property regularly or permanently lo-

cated within its limits, where the ascertainment of the amount assessed is made 'dependent in fact on the value of its property situated within the State.' *Postal Telegraph Co. v. Adams*, 155 U. S. 686, 696; *Leloup v. Mobile*, 127 U. S. 640, 649. On the contrary, it is to be deduced from the adjudged cases that a corporation of one State, authorized by its charter to engage in lawful commerce among the States, may not be prevented by another State from coming into its limits for all the legitimate purposes of such commerce. It may go into the State without obtaining a license from it for the purposes of its interstate business, and without liability to taxation there, on account of such business.

"But it is said that none of the authorities cited are pertinent to the present case, because the State expressly disclaims any purpose by the statute in question to obstruct or embarrass interstate commerce, but seeks only to prevent the Telegraph Company from entering the field of domestic business in Kansas without its consent and without conforming to the requirements of its statute. But the disavowal by the State of any purpose to burden interstate commerce cannot conclude the question as to the fact of such a burden being imposed, or as to the unconstitutionality of the statute as shown by its necessary operation upon interstate commerce. If the statute, reasonably in-

terpreted, either directly or by its necessary operation, burdens interstate commerce, it must be adjudged to be invalid, whatever may have been the purpose for which it was enacted, and although the company may do both interstate and local business. This Court has repeatedly adjudged that in all such matters the judiciary will not regard mere form, but will look through forms to the substance of things. Such is an established rule of constitutional construction as the adjudged cases abundantly show. . . .

"Looking, then, at the natural and reasonable effect of the statute, disregarding mere forms of expression, it is clear that the making of the payment by the Telegraph Company, as a charter fee, of a given per cent of its authorized capital, representing, as that capital clearly does, all of its business and property, both within and outside of the State, a condition of its right to do local business in Kansas, is, in its essence, not simply a tax for the privilege of doing local business in the State, but a burden and tax on the Company's interstate business and on its property located or used outside of the State. The express words of the statute leave no doubt as to what is the basis on which the fee, specified in the State statute, rests. That fee, plainly, is not based on such of the company's capital stock as is represented in its local business and property in Kansas. The requirement is a given per cent of the company's author-

ized capital, that is, all its capital, wherever or however employed, whether in the United States or in foreign countries, and whatever may be the extent of its lines in Kansas as compared with its lines outside of that State. What part of the fee exacted is to be attributed to the company's domestic business in Kansas and what part to interstate business, the State has not chosen to ascertain and declare in the statute. It strikes at the company's entire business wherever conducted and its property wherever located, and, in terms, makes it a condition of the telegraph company's right to transact purely local business in Kansas that it shall contribute for the benefit of the State school fund a given per cent of its whole authorized capital, representing all of its property and all its business and interests everywhere. . . .

"But, as already said, what part of the fee exacted by Kansas is to be attributed to intrastate business and what part to interstate business the State has not chosen to ascertain and declare. It has seen proper to exact a specified per cent of the authorized capital of the Telegraph Company, representing, necessarily, all its business, interstate and intrastate, and all its property interests in and out of the State. It is important here to observe—indeed, the contrary could not be asserted—that the Telegraph Company lawfully entered Kansas, with the consent of both the Territory and State, for the purposes of

its business of every kind long before, and was legally there when the Bush Act was passed. The State concedes its right to continue in such business in Kansas, if it will comply with the statute in question, and pay the fee demanded; and only because of such refusal it seeks the aid of the Court to oust the company from the State, so far as local business is concerned, unless it shall, by paying such fee, contribute—that is the proper word—a given per cent of all its capital for the support of the schools of the State. The State knows that the Telegraph Company, in order to accommodate the general public and make its telegraphic system effective, must do all kinds of telegraphic business. Yet, it seeks to enforce a regulation requiring the company by paying the 'fee' in question to assent to its interstate business being burdened and its property outside of Kansas being taxed in order that it may continue to conduct a business concededly beneficial to the public—a right lawfully acquired from the United States when Kansas was a Territory, and exercised, consistently with the statutes of the State for many years after Kansas was admitted as a State of the Union.

"But it is said to be well settled that a State, in the exercise of its reserve powers, may prescribe the terms on which a foreign corporation, whatever the nature of the business, may enter and do business within its limits.

"It is true that in many cases the general

rule has been laid down that a State may, if it chooses to do so, exclude foreign corporations from its limits, or impose such terms and conditions on their doing business in the State as in its judgment may be consistent with the interests of the people. But those were cases in which the particular foreign corporation before the court was engaged in ordinary business and not directly or regularly in interstate or foreign commerce. . . .

"We repeat that the statutory requirement that the Telegraph Company shall, as a condition of its right to engage in local business in Kansas, first pay into the State school fund a given per cent of its authorized capital, representing all its business and property everywhere, is a burden on the company's interstate commerce and its privilege to engage in that commerce, in that it makes both such commerce, as conducted by the company, and its property outside of the State, contribute to the support of the State's schools. Such is the necessary effect of the statute, and that result cannot be avoided or concealed by calling the exaction of such a per cent of its capital stock a 'fee' for the privilege of doing local business. To hold otherwise is to allow form to control substance. It is easy to be seen that if every State should pass a statute similar to that enacted by Kansas, not only the freedom of interstate commerce would be destroyed, the decisions of this Court nullified and the business of the

country thrown into confusion, but each State would continue to meet its own local expenses not only by exactions that directly burdened such commerce, but by taxation upon property situated beyond its limits. We cannot fail to recognize the intimate connection which, at this day, exists between the interstate business done by interstate companies and the local business which, for the convenience of the people, must be done or can generally be better and more economically done by such interstate companies rather than by domestic companies organized to conduct only local business. It is of the last importance that the freedom of interstate commerce shall not be trammelled or burdened by local regulations which, under the guise of regulating local affairs, really burden rights secured by the Constitution and laws of the United States. While the general right of the States to regulate their strictly domestic affairs is fundamental in our constitutional system and vital to the integrity and permanence of that system, that right must always be exerted in subordination to the granted or enumerated powers of the General Government, and not in hostility to rights secured by the Supreme Law of the Land.

. . .

"That the Western Union Telegraph Company is engaged in both interstate and intrastate commerce is no reason, in itself, why Kansas may not, in good faith, require it to

pay a license tax strictly on account of local business done by it in that State. But it is altogether a different thing for Kansas to deny it the privilege of doing such local business, beneficial to the public, except on condition that it shall first pay to the State a given per cent of all its capital stock, representing all of its property, wherever situated, and all its business in and outside of the State. . . .

"In the present case the State of Kansas demands, in the form of a fee, a given per cent of all the capital of the foreign corporation, without any discrimination between the capital representing the business and property of the Telegraph Company outside of the State and the capital representing such of its business and property as are wholly local to the State. And it seeks the aid of the Court to oust the Telegraph Company from continuing to do business in the State, so far as local business is concerned, because and only because it will not surrender its immunity from State taxation in reference to its interstate business and its property outside of Kansas. . . .

"It results that a decree of ouster, such as the State asks, could not be granted without recognizing the validity of and giving effect to the unconstitutional requirement that the Telegraph Company, as a condition of its being allowed to do intrastate business in Kansas, should pay into the State school fund a given per cent of its authorized capital

in the form of a fee based, as in effect it is, on all its property, business and interests everywhere, including both its interstate and intrastate business and property. Such a decree is asked on the ground that the company has refused to pay such fee. The State Court ought to have refused the affirmative relief asked and dismissed the petition upon the ground that the condition sought to be enforced by a decree of ouster was in violation of the commerce and due process clauses of the Constitution and of the company's rights under that instrument."

In *Pullman Co. v. Kansas*, 216 U. S. 56, 62, the same statute of Kansas was under consideration, which was discussed in *Western Union Tel. Co. v. Kansas, supra*, the court holding that the company was not bound to obtain the permission of the State to transact interstate business within its limits, but could go into the State for the purpose of that business without liability to taxation there with respect to such business, although subject to reasonable local regulations for the safety, comfort and convenience of the people, which did not, in a real and substantial sense, burden or regulate its interstate business, nor subject its property interests outside of the State to taxation in Kansas.

This language with respect to the burden upon interstate commerce is equally applicable here, although that part of the opinion relative to taxation of property beyond the jurisdiction of the State, and with respect to the "due process" clause of the Constitution are perhaps not so clearly involved.

The Kansas statute in question did not levy a tax on the entire capital stock of a foreign corporation, but it levied the tax on that proportion of the entire capital stock represented by the entire value of the property owned and used by the Company for the transaction of its intrastate and interstate business in Kansas, compared with the entire value of its property owned and used in its business outside of Kansas. No other construction can be given the statute. This is only another way of imposing a tax on that portion of the entire capital stock of a foreign company devoted to the conduct of its intrastate and its interstate business in Kansas. It is immaterial whether the tax is placed on the entire capital stock or on a portion of it, as the proportion taxed is a proportion devoted largely to the conduct of interstate business. It could have made no difference in the Western Union and Pullman cases if the tax had

been imposed on that part of the authorized capital stock which was devoted to the conduct of the intrastate and the interstate business of the Company within the State of Kansas. To use the language of this Court in the Pullman case, "That fee, plainly, is not based upon such of the Company's capital stock as is represented in its local business and property in Kansas," and this is true because the portion of the capital stock here taxed is based upon all of the property owned and used in Kansas, and devoted largely to the conduct of the interstate business of foreign railway companies. Whether a tax is based upon the entire capital stock of foreign corporations or only on a part of it, can be of no consequence if it is imposed as a condition of doing interstate business, as the statute says, or as a condition of doing intrastate business, as the Kansas Supreme Court says, the effect of both being an unlawful imposition on the right to conduct interstate business.

In the Western Union and Pullman cases, as a condition of the right to do intrastate business, foreign corporations were required to pay a percentage of their entire capital stock, but here as a condition of the right to do both State and inter-

state business foreign corporations are required to pay a fixed fee based on that part of their entire capital stock represented by the entire value of their property in Kansas which is devoted to both intrastate and interstate commerce, compared with the total value of all of their property. It is submitted that the impositions placed upon interstate commerce by the act in question are far more burdensome, and more apparently illegal than were the burdens held unenforceable in the Western Union and Pullman cases: the only distinction being that since the tax was not placed on the entire capital stock of the company, it perhaps could not be successfully claimed that property beyond the State of Kansas was taxed, and that, therefore, the due process clause of the Constitution was involved.

If the statute under consideration had placed a tax on the entire capital stock of the foreign corporations engaged in interstate commerce it would have been void as a direct tax and burden on interstate commerce. *Norfolk & W. R. Co. v. Pennsylvania*, 136 U. S. 114, 120; *Western Union Tel. Co. v. Kansas*, 216 U. S. 1; *Pullman Co. v. Kansas*, 216 U. S. 56; *Ludwig v. Western Union Tel. Co.*, 216 U. S. 146; *Atchison, T. & S. F. Ry.*

Co. v. O'Connor, 223 U. S. 280; *Minnesota Rate Cases*, 230 U. S. 352, 400, 401. And it can make no difference that only a part of the capital stock is taxed, where the part taxed, like the whole, is largely devoted to the performance of interstate business. Here as a condition of the right to do either local or interstate business a tax is levied on a certain proportion of the capital stock of foreign corporations. The proportion used as a basis is immaterial so long as the proportion taxed represents property devoted to both intrastate and interstate business, and is taxed as a prerequisite to the right to continue that business. *Oklahoma v. Wells-Fargo & Co.*, 223 U. S. 298; *Galveston, H. & S. A. Ry. Co. v. Texas*, 210 U. S. 217. The statute in question manifestly imposes a condition upon foreign railway corporations respecting their right to conduct interstate business within the State of Kansas. The right of a foreign railway corporation to be free from all fetters, whatever their extent, with respect of such commerce, is now well established by a long series of decisions. *Western Union Tel. Co. v. Kansas*, 216 U. S. 1; *International Textbook Co. v. Pigg*, 217 U. S. 91; *Minnesota Rate Cases*, 230 U. S. 352, 400; *Buck Stove Co. v. Vickers*, 226 U. S. 205; *Adams Ex-*

press Co. v. New York, 232 U. S. 14; *Sioux Remedy Co. v. Cope*, 235 U. S. 197, 201. A proportional basis is proper enough as a basis for a property tax or one in *lieu* thereof, but the constitutionality of a statute making the doing of interstate commerce conditional upon the payment of a fee for such privilege cannot be made to depend upon the amount of the fee nor the extent of the burden.

If, as the Supreme Court of Kansas contends, the tax is levied only on the right to do an intrastate business in Kansas, nevertheless the explicit terms of the statute impose a direct burden on the interstate business of foreign railway corporations as a prerequisite to their right to do a local business in Kansas. The tax is determined, according to the mandatory provisions of the statute, by the amount of the capital stock devoted to its business in Kansas, and this in turn must be determined according to the statute by the total value of the property of the foreign corporation owned and used in Kansas, as compared with the remaining value of its property outside of Kansas. Thus the statute requires that the basis of the tax shall be determined by the amount of the capital stock representing the property of the foreign corpo-

ration, which is, so far as this Railway Company is concerned, largely devoted within the State of Kansas to its interstate business. Neither upon fact nor principle can this case be distinguished from the facts and the principle promulgated by this court in *Western Union Tel. Co. v. Kansas*, 216 U. S. 1; *Pullman Co. v. Kansas*, 216 U. S. 56; *Ludwig v. Western Union Tel. Co.*, 216 U. S. 146; *Atchison, T. & S. F. Ry. Co. v. O'Connor*, 223 U. S. 280. It can make no difference in principle that the Kansas tax was laid on a part of the capital stock of a foreign railway company which was devoted to the conduct of its interstate business instead of being placed upon the entire capital stock. It is the fact that interstate commerce is directly and substantially burdened by the tax rather than its amount which renders the tax illegal.

Even if the construction of the Kansas Supreme Court were proper, the result would be that foreign corporations, for the privilege of conducting an intrastate business in Kansas, would be obliged to pay a tax upon their interstate commerce and their property largely devoted to that business. The Kansas tax being primarily determined by the total value of the property used by a foreign corporation in Kansas in both its intrastate and in-

terstate business compared with the total value of its property outside of Kansas devoted to its general business, means, of necessity, that the amount of the tax will rise or fall according as the interstate business of such foreign corporation both in and outside of Kansas and the value of the property devoted thereto increases or diminishes. The value of the property of a foreign corporation either within or without the State of Kansas will rise or fall in proportion with the increase or decrease of its general business; whenever the interstate business of a foreign corporation in Kansas increases, it will necessarily result in an increase of the value of its property devoted to its business in Kansas, and thus the tax will be increased. The situation is not unlike that which arose in *Crane Co. v. Looney*, 218 Fed. Rep. 260, where similar statutes of the state of Texas were involved. In that case it was said:

> "An imposition which is based, whether in whole or in substantial part, on the value of property outside of the State, or on interstate or foreign commerce engaged in, so that the amount of it grows in exact proportion to the growth of such property or commerce, is a burden on such property or commerce. This burden the State cannot impose, either di-

> rectly or as a condition to the grant of a privilege which it may confer or withhold . . . The exactions being so made that the amount of them cannot be determined without taking into account the amount of property and business which are not subject to State taxation, and being greater or less according as such property or business is greater or less, the necessary effect of the enforcement of them is to burden such property or business."

This language applies with equal force to the situation before this Court, and clearly distinguishes the Kansas statute from that involved in the case of *Baltic Mining Co. v. Massachusetts*, 231 U. S. 68, relied upon by counsel for the State.

Section 6 of the act considered alone, places a direct burden on the interstate commerce of foreign railway corporations.

It provides that a failure on the part of a domestic corporation to file the statement, accompanied by the fee, shall work a forfeiture of the charter of such corporation. The statute then proceeds:

> "The failure of any foreign corporation to file such annual statement as heretofore provided within ninety days from the time provided for filing the same shall work a forfeiture of its right or authority to do busi-

> ness in this State, and the Charter Board may at any time thereafter declare such forfeiture, and shall forthwith publish such declaration in the official State paper."

The statute is plain and unambiguous. As to domestic corporations it provides that a failure to pay the fee shall result in a forfeiture of their charter, and upon the happening of this event the Attorney-General is directed to apply for the appointment of a receiver to close up the entire business of such corporation, both local and interstate. It was contemplated, clearly, that a failure to pay the fee on the part of a domestic corporation should result in its inability to carry on any of its business after the charter was formally forfeited. A like provision is made with respect to foreign corporations. Upon their failure to pay the fee demanded, their license to do business in Kansas given by the State is not canceled, but *the statute goes further, and provides that such failure shall work a forfeiture of the right of a foreign corporation to do business in the State.* Nowhere in the statute is there any language that will admit of the contention that it was the legislative intention to confine the operation of the statute to the purely intrastate business of either domestic

or foreign corporations. The plain language and apparent purpose of the statute impels the conviction that it was the intention of the legislature to deny to a foreign corporation the right to continue business in Kansas of any character upon its failure to file the statement and pay the fee demanded. No other purpose can be found in the statute by the application of any canon of construction. While ambiguous statutes should be so construed as to render them constitutional if possible, yet statutes which are plain and unambiguous, and where there is no room for construction should not be changed and other language interpolated for the purpose of accomplishing an end which the legislature did not have in mind. Giving to the statute the meaning which its terms impel, the following language of Mr. Justice PITNEY in *St. Louis, S. W. Ry Co. v. Arkansas*, 235 U. S. 350, 368, demonstrates that the statute in question places an unlawful burden upon interstate commerce:

> "If this must needs be construed to mean that for non-payment of the franchise tax a foreign railroad corporation engaged in business as a common carrier of intrastate and interstate commerce is to forfeit its right to do business in the State, not only with re-

spect to intrastate but also with respect to interstate commerce, the effect would be to impose a condition upon its right to transact interstate commerce, and the act would be invalid as amounting in effect to a regulation of that commerce."

THE ARGUMENT OF COUNSEL FOR THE STATE, AND THE AUTHORITIES CITED IN SUPPORT THEREOF, ARE NOT PERSUASIVE IN RESPECT OF THE QUESTION UNDER CONSIDERATION.

The statute under consideration cannot be sustained on the theory that it was imposed as a charge for the privilege of carrying on business as a corporation within the State of Kansas. The language of the statute itself repels this construction. Section 11 of the act provides specifically that the tax shall be "in addition to the initial fees." The initial fees referred to are those which the State of Kansas imposes for the privilege of conferring corporate rights upon applicants, domestic and foreign. (General Statutes of Kansas 1909, Sections 1710, 1712, 1718, 1719, 1720.) These statutes provide for the incorporation of domestic corporations and for the admission into the State of foreign corporations for the purpose of doing business therein, upon the payment of the fees provided by the act. The fees referred to are an ap-

plication fee; a filing and recording fee; and a capitalization fee, which is based on the total amount of the authorized capital stock of the company. Section 1712 after providing that the State Charter Board shall make investigation with respect to foreign corporations, provides:

> "Upon the payment of the fees provided by this act to be paid, the application shall be filed in the office of the Secretary of State, and the Secretary of State shall issue a certificate setting forth the fact that the application of the corporation has been approved by the Charter Board, and that such corporation is authorized to engage in business in this State."

Were this statute under consideration the authorities cited by counsel for the State of Kansas would be applicable, but they are not in point here, as the statute in question was not one by which a State sought to impose a fee for the privilege it conferred of doing business in a corporate capacity. On the contrary, and as the statute itself expressly provides it was imposed "for the privilege of exercising its franchise in Kansas." In short, it comes within the distinction drawn by this Court in the case of *Home Insurance Co. v. New York*, 134 U. S. 594, as it is a tax on "the privilege or franchise which, when incorporated, the Com-

pany may exercise," and which this Court found was not attempted to be taxed in that case. The act in question, as appears on its face, repeals Section 1726 of the General Statutes of Kansas 1909, but as a matter of fact the only substantial difference between Section 1726 and the act in question is that the filing fee of one dollar provided by Section 1726 is increased in the case of this Railway Company to twenty-five hundred dollars. It must be borne in mind that all of the sections above referred to, including Section 1726, were sections of a single act of the legislature of the State of Kansas. (Chapter 140, Laws of Kansas 1907.) This inspection of the statutes of Kansas shows conclusively that the act in question was not passed for the purpose of imposing a charge for the privilege conferred by the State of Kansas of permitting business to be done in that State in a corporate capacity. It was an act manifestly passed for the purpose of levying a tax upon the business done by such corporations after they had been lawfully created or admitted into the State of Kansas for the purpose of doing that business, and the intended result is that this Railway Company is charged a heavy fee as a prerequisite of its continuation in business, intrastate or interstate,

in Kansas. As has been pointed out, the Kansas Supreme Court construed the statute as one imposing a tax for the privilege of doing business and not one for the right to conduct business in a corporate capacity.

> "In whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect."

Henderson v. Mayor of New York, 92 U. S. 259, 268. And judged by that criterion, it is apparent that the object of this statute is to compel foreign railway companies largely engaged in interstate commerce to pay annually a large sum of money for the privilege of conducting their inseparable intrastate and interstate business within the State of Kansas.

In *Brown v. Maryland*, 12 Wheat. 419, this Court said:

> "All must perceive that a tax on the sale of an article, imported only for sale, is a tax on the article itself."

Likewise a tax on a franchise obtained and exercised only for the purpose of carrying on a transportation business, the very great majority of which is interstate commerce, is a tax on the commerce itself, and upon that portion of it which

lies within the exclusive jurisdiction and control of Congress.

In *Home Insurance Company v. New York*, 134 U. S. 594, a tax was imposed upon the Insurance Company under a New York statute, which provided that every domestic corporation shall be subject to pay a tax "as a tax upon its corporate or franchise business." The Court held that although the tax was based upon the dividends of the company it did not violate the provisions of the federal statute exempting bonds of the United States of taxation, although a portion of the dividends may be derived from interest in capital invested in such bonds, as it was simply a tax levied by the State upon the privilege of doing business as a corporate body. The distinction was clearly drawn by Mr. Justice FIELD in the following language:

> "By the term 'corporate franchise or business,' as here used, we understand is meant (not referring to corporations sole, which are not usually created for commercial business) the right or privilege given by the State to two or more persons of being a corporation, that is, of doing business in a corporate capacity, and not the privilege or franchise which, when incorporated, the Company may exercise."

The complaining corporation in that case was not engaged in commerce, but was a domestic corporation depending upon the will of the State for its continued existence as a corporation, and for this privilege conferred by the State, the State had the right to impose a charge. Such is not the situation now before this Court. This Railway Company, a foreign corporation largely engaged in interstate commerce, was under no obligation to procure from the State of Kansas a license to perform interstate commerce in that State, and a continuation of such business by such a foreign corporation cannot be made to depend upon the payment of a license fee exacted by the State of Kansas.

In *Society for Savings v. Coite*, 6 Wall. 594, a statute of Connecticut was under consideration. This statute provided for a tax on savings banks incorporated under the laws of that State based on a certain percentage of their total deposits. The bank in question had a portion of its deposits invested in securities of the United States. This Court said:

> "Viewed as a tax on property the assessment, so far as respects the amount in controversy, would be illegal, as it is well settled

> by repeated decisions of this Court that the States cannot tax the securities of the United States, declared by act of Congress to be exempt from taxation, for any purpose whatever."

The tax was regarded by the majority of the Court as not a tax on property but a tax upon the franchise of the corporation only, the Court saying:

> "The privileges and franchises of a private corporation are as much the legitimate subject of taxation as any other property of the citizens which is within the sovereign power of the State. . . . Nothing can be more certain than that the privileges and franchises of a private corporation, and all trades and avocations by which the citizens acquire a livelihood, may be taxed by a State for the support of the State government."

For the same reason a similar statute of Massachusetts was approved in *Provident Institution v. Massachusetts*, 6 Wall. 611. These decisions were based solely on the proposition that a corporate franchise is a legal estate in which the corporation has a legal interest and which is subject to taxation on the ground that the franchise is within the protection and control of the sovereign power of the State.

Hamilton Company v. Massachusetts, 6 Wall. 632, considered a similar Massachusetts statute providing that corporations having a capital stock divided into shares should pay a certain percentage on the market value of their capital stock over and above the value represented by their real estate and machinery. In addition to real estate and machinery the particular corporation owned certain bonds of the United States. The Court held that regarded as a tax on property the tax would be plainly invalid, but that as a franchise tax it could be sustained. The Court following the reasons in the preceding cases held that the corporate franchise was a legal estate and that the privileges and franchises of a private corporation being charged with no public duties whatever are the legitimate subject of taxation. "All trades and avocations by which the citizens acquire a livelihood may also be taxed by the State for the support of the State government." The statutes considered in these cases imposed taxes on domestic companies having no public duties, and whose franchises and privileges were not used in a service permitted or controlled by Congress. Conceding that the statutes did not impose a tax

on the property of the corporations no federal question was or could be involved.

Speaking of the character of these cases in the recent case of *Flint v. Stone Tracy Co.*, 120 U. S. 107, 165, this Court said that they came within the rule well settled by the decisions of this Court:

> "That when the sovereign authority has exercised the right to tax a legitimate subject of taxation as an excise of a franchise or privilege, it is no objection that the measure of taxation is found in the income produced in part from property which of itself considered is non-taxable."

In these cases the State was taxing a privilege within its power to grant or withold, and the right conferred was a legitimate subject of taxation. However measured, a tax under such circumstances is valid, but these cases cannot be authority for the position that a State can tax a privilege which it is powerless to give or control and for the use of which the Constitution and laws of the United States guarantee an unfettered exercise.

In State Tax on Railway Gross Receipts, 15 Wall. 284, a statute of Pennsylvania was under consideration which provided that every railroad company "incorporated under the laws of this commonwealth" should pay to the State a cer-

tain tax upon its gross receipts. The tax was upheld first on the ground that it did not interfere with interstate commerce: the Court taking the position that interstate commerce was not affected, but that the tax was laid upon money received and after it had come into the company's hands, it being described at that time as having lost its character as freight earned and having become incorporated into the general mass of the company's property. It was further upheld on the ground of being a franchise tax When this statute and the rule of this case came to be further considered by this Court in *Philadelphia & Southern Steamship Co. v. Pennsylvania*, 122 U. S. 326, its reasoning was overthrown, it being held that the tax on the gross receipts was a direct regulation of interstate commerce, and, therefore, void. The following language, moreover, with respect to the question of its being a franchise tax seems conclusive of the situation here so far as this Railway Company, a foreign corporation, is concerned:

> "The second ground on which the decision referred to was based was, that the tax was upon the franchise of the corporation granted to it by the State. We do not think that this can be affirmed in the present case. It cer-

> tainly could not have been intended as a tax on the corporate franchise, because, by the terms of the act, it was laid equally on the corporations of other States doing business in Pennsylvania. If intended as a tax on the franchise of doing business—which in this case is the business of transportation in carrying on interstate and foreign commerce—it would clearly be unconstitutional."

The Kansas statute was not intended as a tax on the corporate franchise, as it was made applicable both to domestic and foreign corporations, and because by other Kansas statutes a distinct fee was assessed by the State for the purpose of permitting business to be done by corporations. The Kansas statute in question imposed a tax, to use the language in Section 11, "for the privilege of exercising its franchise in Kansas." In other words, it was "intended as a tax on the franchise of doing business," which, so far as this Railway Company is concerned, was largely devoted to interstate commerce. The following language shows the clear line of demarcation between the valid franchise taxes imposed under certain conditions referred to by counsel for the State, and the burden attempted to be placed by the Kansas

statute upon the interstate commerce of the railroads doing business in that State:

> "No doubt the capital stock of the former, regarded as inhabitants of the State, or their property, may be taxed as other corporations and inhabitants are, provided no discrimination be made against them as corporations carrying on foreign or interstate commerce, so as to make the tax, in effect, a tax on such commerce. But their business as carriers in foreign or interstate commerce cannot be taxed by the State, under the plea that they are exercising a franchise. . . . The corporate franchises, the property, the business, the income of corporations created by a State may undoubtedly be taxed by the State; but in imposing such taxes care should be taken not to interfere with or hamper, directly or by indirection, interstate or foreign commerce, or any other matter exclusively within the jurisdiction of the Federal government. This is a principle so often announced by the courts, and especially by this Court, that it may be received as an axiom of our Constitutional jurisprudence."

The proposition is clearly stated by Mr. Justice BRADLEY in *Philadelphia & Southern Steamship Co. v. Pennsylvania*, 132 U. S. 326, 342, in speaking of a former decision of this Court in which a

tax upon a domestic corporation was sustained as a franchise tax:

> "The second ground on which the decision referred to was based was, that the tax was upon the franchise of the corporation granted to it by the State. We do not think that this can be affirmed in the present case. It certainly could not have been intended as a tax on the corporate franchise, because, by the terms of the act, it was laid equally on the corporations of other States doing business in Pennsylvania. If intended as a tax on the franchise of doing business—which in this case is the business of transportation in carrying on interstate and foreign commerce—it would clearly be unconstitutional."

And in speaking of the same question which arose in the case of *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, Mr. Justice BRADLEY said:

> "It is hardly necessary to add that the tax on the capital stock of the New Jersey Company, in that case, was decided to be unconstitutional, because, as the corporation was a foreign one, the tax could only be construed as a tax for the privilege or franchise of carrying on its business, and that business was interstate commerce."

So far as foreign railway companies are concerned, whose business within the State of Kansas

is largely interstate commerce, it must be conceded that the Kansas tax can only be construed as being a tax for the privilege of carrying on its business within that State and such business being beyond the control of the State, the statute as to such corporations must fail.

In *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, it appeared that a ferry had been established by a New Jersey corporation, and was in operation between New Jersey and Pennsylvania. It had leased a dock in Pennsylvania, but owned no property there. A Pennsylvania statute provided that all corporations doing business in the State should pay a certain tax on their capital stock, the amount depending on the dividends declared. The Court held that while the wharf which the company leased might be taxed as property, yet the tax in question was void as a direct tax on the interstate business of the company. The Court said:

> "While it is conceded that the property in a State belonging to a foreign corporation engaged in foreign or interstate commerce may be taxed equally with the property of a domestic corporation engaged in that business, we are clear that a tax or other burden imposed on the property of either corporation because it is used to carry on that commerce,

> or upon the transportation of persons or property, or for the navigation of the public waters over which the transportation is made, is invalid and void as a interference with, and an obstruction of the power of Congress in the regulation of such commerce."

Speaking of this case in *Philadelphia & Southern Steamship Co. v. Pennsylvania*, 122 U. S. 326, 344, this Court held that the statute was declared to be invalid as the corporation was a foreign one and the tax could only be construed as a tax for the privilege of carrying on its business, which was largely interstate commerce. The situation there cannot on any theory be distinguished from that now before the Court.

Horn Silver Mining Co. v. New York, 143 U. S. 305, 313, 314, 315, is also cited. The mining company was a foreign corporation doing business in the State of New York, and was taxed under a statute of that State providing that every corporation doing business in the State should be subject to a tax "upon its corporate franchise or business, to be computed according to a certain percentage upon the par value of the capital stock, and in others upon the actual value of the capital stock. The tax was sustained on the ground that

> "The right and privilege, or the franchise, as it may be termed, of being a corporation, is of great

value to its members, and is considered as property separate and distinct from the property which the corporation itself may acquire. According to the law of most States this franchise or privilege of being a corporation is deemed personal property. and is subject to separate taxation. . . .The granting of the rights and privileges which constitute the franchises of a corporation being a matter resting entirely within the control of the legislature, to be exercised in its good pleasure, it may be accompanied with any such conditions as the legislature may deem most suitable to the public interests and policy. It may impose as a condition of the grant, as well as, also, of its continued exercise, the payment of a specific sum to the State each year, or a portion of the profits or gross receipts of the corporation, and may prescribe such mode in which the sum shall be ascertained as may be deemed convenient. . . . . As to a foreign corporation—and all corporations in States other than the State of its creation are deemed to be foreign corporations—it can claim a right to do business in another State, to any extent, only subject to the conditions imposed by its laws. . . Having the absolute power of excluding the foreign corporation the State may, of course, impose such conditions upon permitting the corporation to do business within its limits as it may judge expedient; and it may make the grant or privilege dependent upon the payment of a specific license tax, or a sum proportioned to the amount of its capital."

The reason for this decision is apparent. Domestic and foreign corporations were treated alike and there was no ground for contending that the tax denied a foreign corporation the equal protection of the laws, nor that it taxed property beyond the State, and it is manifest that the commerce clause of the constitution was not involved because the corporation was not engaged in commerce, domestic or interstate. It was purely a tax upon the right to do business as a corporation, but the Court was particular to call attention to the exception to the rule laid down, that is to say, that a State "cannot exclude from its limits a corporation engaged in interstate or foreign commerce."

The tax in question was a tax for the privilege of exercising the right which the State would grant or withhold at its option. The tax imposed by the State of Kansas is a tax placed upon the conduct of business which the State is powerless to regulate or control, except by the proper exercise of its police power, and which under no circumstances can it exclude from its borders.

The case of *Wiggins Ferry Co. v. East St. Louis*, 107 U. S. 365, is apparently relied upon to sustain the contention that a State may exact a license for the doing of an interstate business under certain circumstances. In that case the City of East St. Louis im-

poses a license tax on keepers of ferries for boats owned by them and used in ferrying passengers and goods from a landing in the State across a navigable river to a landing in another State. The tax was sustained apparently on the theory that a State had the right to tax facilities owned by its citizens and having their *situs* within the State, although used in foreign or interstate commerce. As a statement that property used in the conduct of interstate commerce may be taxed by the State where it is located, the authority is unquestioned. This seems to be the construction which this Court has placed upon the decision. *Covington and Cincinnati Bridge Co. v. Kentucky*, 154 U. S. 204, 220. But if the authority is to be considered as one holding that a State has the right to impose a license upon a company for the privilege of conducting interstate business, it has been overruled by *Moran v. New Orleans*, 112 U. S. 69, and *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, and expressly overruled by the recent decision of this Court in *City of Sault Ste. Marie v. International Transit Co.*, 234 U. S. 333, 340, wherein it is said:

> "The fundamental principle involved has been applied by this Court in recent decisions in a great variety of circumstances, and it must be taken to be firmly established that one other-

wise enjoying full capacity for the purpose cannot be compelled to take out a local license for the mere privilege of carrying on interstate or foreign commerce."

If the State of Kansas can impose a tax upon a foreign railway company as a prerequisite of its right to do intrastate and interstate business within that State, it may likewise increase the tax to a place where it would be prohibitive, and if its consent under any circumstances is necessary it may withhold it. The result is that if the Kansas statute is to be considered as valid, that State may prevent the doing of interstate business within its borders. Following the reasoning of the case last above cited, it must follow that a foreign railway company which enjoyed the full capacity to conduct interstate commerce within the State of Kansas previous to the enactment of the Kansas statute, cannot be compelled to pay a burdensome tax for the privilege of carrying on interstate commerce within or through the State of Kansas, neither can such commerce be taxed for the privilege of doing a purely local business within that State.

Neither does the case of *Ashley v. Ryan*, 153 U. S. 436, bear upon the situation before the Court. In that case several railroad corporations existing under the laws of separate States were consolidated, and

the articles of incorporation filed in Ohio for the purpose of becoming a domestic consolidated corporation of that State. The laws of Ohio provided for a fee based upon a certain percentage of its entire authorized stock to be paid as a prerequisite for such authority granted by the State of Ohio. This Court said:

> "The purpose of the tender of the articles of consolidation to the Secretary of State was to secure to the consolidated company certain powers, immunities, and privileges which appertain to a corporation under the laws of Ohio. The rights thus sought could only be acquired by the grant of the State of Ohio, and depended for their existence upon the provisions of its laws. Without that State's consent they could not have been procured. . . Nor is the question at issue affected by the fact that some of the constituent elements which entered into the consolidated company were corporations owning and operating property in another State. The power of corporations of other States to become corporations, or to constitute themselves a consolidated corporation under the Ohio statutes, and thus avail of the rights given thereby, is as completely dependent on the will of that State as is the power of its individual citizens to become a corporate body, or the power of corporations of its own creation to consolidate under its laws. . . It follows from these principles that a State, in granting a corporate privi-

> lege to its own citizens, or, what is equivalent thereto, in permitting a foreign corporation to become one of the constitutent elements of a consolidated corporation organized under its laws, may impose such conditions as it deems proper, and that the acceptance of the franchise in either case implies a submission to the conditions without which the franchise could not have been obtained."

The granting of the privilege to foreign corporations to become constituent elements of a consolidated corporation authorized by the laws of Ohio, rested entirely in the discretion of that State, and it could impose such prerequisite burdens thereon as it saw fit. No such situation exists here; the Kansas statute imposes a direct tax upon the privilege of doing business in interstate commerce, the doing of which does not rest upon the discretion of the State, and must be carried on free from burdening restrictions of that or any other State. The Kansas statute imposes no condition upon the granting of a right or upon the continuation of a privilege which it has the constitutional right to withhold or regulate; but on the contrary, it imposes a burdensome tax which must either be paid or the right of foreign railway companies to do either intrastate or interstate business within the State shall cease, and in the language of the statute

a failure to pay such tax "shall work a forfeiture of its right or authority to do business in this State, and the Charter Board may at any time thereafter declare such forfeiture, and shall forthwith publish such declaration in the official State paper."

The case of *Flint v. Stone Tracy Co.*, 200 U. S. 107, 163, cited by counsel for the State upon the proposition that a franchise tax, if otherwise valid, may be measured by a reference to property which is itself not taxable by the State, states a well settled rule, but one which is not applicable here. In that case this Court said:

> "Where a tax is lawfully imposed upon the exercise of privileges within the taxing power of the State or Nation, the measure of such tax may be the income from the property of the corporation, although a part of such income is derived from property in itself non-taxable. The distinction lies between the attempt to tax the property as such and to measure a legitimate tax upon the privileges involved in the use of such property."

The rule is not in point here because the fundamental premise upon which it is based is wanting; that is to say, the Kansas tax was not lawfully imposed upon the exercise of a privilege within the taxing power of the State. Foreign railway companies had the right to engage in interstate commerce within the State of

Kansas without the consent of the State, and without the necessity of being taxed for a license permitting such business. The tax itself being illegal, the method of its measurement is unimportant.

The case of *United States Express Co. v. Minnesota*, 223 U. S. 335, is likewise without importance here. In that case the State law provided for an annual tax upon the gross receipt of express companies "which shall be in lieu of all taxes upon its property. The Supreme Court of Minnesota construed the tax to be a property tax measured by the gross earnings within the State. This Court held that,

> "While the determination that the tax is a property tax measured by gross receipts is not binding upon this Court, we are not prepared to say that this conclusion is not well founded, in view of the provisions and purposes of the law. . . The right of the State to tax property, although it is used in interstate commerce, is thoroughly well settled."

The tax in question being admittedly not a tax upon property, the case cited has no bearing upon the situation before the Court. The statement in the cited case that where a tax is within the legitimate authority of the taxing body it may be measured, in part, by the income from property not itself taxable, is likewise unimportant here, as the fundamental question here is

whether the State of Kansas had the right to impose a tax upon a foreign railway corporation for the privilege of doing interstate business in Kansas. The measure of the tax is not involved.

The two cases last above cited were relied upon by the Supreme Court of Kansas. The rule promulgated by them is well settled, but not involved here. If, as contended by foreign railway companies and as stated by the plain terms of the statutes, the tax is made a condition of the right to do either intrastate or interstate business in Kansas, the cases are not in point, as the State of Kansas is powerless to withhold or control the franchise to do interstate business. If, as the Supreme Court of Kansas suggests, the statute attempts to regulate only the right to do a local business the cases do not meet the situation, because even as thus construed, a tax is placed on the interstate commerce of foreign railway companies as a prerequisite to their right to do a local business.

The case of *Cornell Steamboat Co. v. Sohmer*, 235 U. S. 549, does not touch the situation now before the Court. The State of New York imposed a tax upon domestic corporations for the privilege of "carrying on its business in such corporate or organized capacity in this State." The fee was based on a certain percentage of the gross earnings of such company within

the State, but was imposed only on "business originating and terminating within this State, but shall not include earnings derived from business of an interstate character." It will be seen, therefore, that the statute only attempted to levy a charge upon the intrastate business of a domestic corporation by the State of its creation for the privilege of being a corporation within the State of its creation. The New York Court in sustaining and defining the nature of the tax held that it was "levied on the corporation for the privilege, as the statute declares, of carrying on its business in a corporate or organized capacity; not of doing business, but of doing business in a corporate capacity; in other words, exclusively for the privilege of being a corporation instead of a partnership. . . If the parties beneficially interested in the appellant are dissatisfied with the price exacted by the State, they may have the corporation dissolved, and as individuals carry on the same business that is being done now, without the cost of any such charge."

The State of New York attempted only to impose a fee upon corporations of that State for the privilege of being corporations and conducting purely intrastate business, but expressly excepted from the charge any payment on account of the interstate busi-

ness performed by such corporations. Speaking of the nature of the charge, Mr. Justice DAY said:

> "In other words, the charge is not upon the navigation of the river, but is upon the doing of business as a corporation of the State within the State."

And so far as the commerce clause of the Constitution was concerned, the Court called attention to the express provision of the statute that interstate commerce was expressly excepted in arriving at the basis by which the tax was fixed. Such is not the situation with respect of the Kansas statute; it imposes a fee as a prerequisite to the doing of interstate business in Kansas. It is not unlike the situation which existed in the case of *Harman v. Chicago*, 147 U. S. 396, in which the City of Chicago imposed a license tax for the privilege of navigating the Chicago River and its branches by tugboats which were licensed by the United States and were engaged at the time, among other things, in towing vessels engaged in interstate commerce. In speaking of the effect of the ordinance, this Court said:

> "Of course, the ordinance, if constitutional and operative, has the effect to restrain the use of the vessels in the legitimate commerce for which they are expressly licensed by the United States.

> It would be a burden and restraint upon that commerce, which is authorized by the United States, and over which Congress has control. No State can interfere with it, or put obstructions upon it, without coming in conflict with the supreme authority of Congress. The requirement that every steam tug, barge or tow-boat, towing vessels or craft for hire in the Chicago River or its branches shall have a license from the City of Chicago, is equivalent to declaring that such vessels shall not enjoy the privileges conferred by the United States, except upon the conditions imposed by the city. This ordinance is, therefore, plainly and palpably in conflict with the exclusive power of Congress to regulate commerce, interstate and foreign."

Likewise the Kansas statute (Section 6) provides that the failure of any foreign corporation to file the statement accompanied by the fee demanded "shall work a forfeiture of its right or authority to do business in this State." The statute intended to and by its express terms does exclude foreign railway companies from the right to do interstate business into, from or through the State of Kansas unless such company pays into the state treasury a fee based upon the entire value of its property within the State of Kansas, represented by a proportionate amount of its entire capital stock devoted to its intrastate and its interstate business within the State of Kansas. The imposition of

the fee is a prerequisite to the right to continue to do intrastate or interstate business within the State of Kansas. But if construed only as a prerequisite to the right to do a purely local business, the fee is levied upon the property of foreign railway corporations devoted to interstate commerce within the State of Kansas and thus the tax is based upon and derived from property largely devoted to the conduct of interstate business.

CHAPTER 135 OF THE LAWS OF KANSAS FOR 1913 DENIES TO FOREIGN RAILWAY COMPANIES THE EQUAL PROTECTION OF THE LAWS, CONTRARY TO THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

By the provisions of the statute, the fee assessed against domestic corporations is based upon their "paid up" capital stock, while the tax assessed against foreign corporations, under the same circumstances, is based upon their "issued" capital stock. Under Section 1709, General Statutes of Kansas 1909, a domestic corporation may begin business when but 20 per cent of its authorized capital is paid up. The inequality of the basis upon which foreign corporations are taxed compared with the basis upon which domestic corporations in the same situation and condition are taxed is ap-

parent. The Court will take judicial notice of the practice resulting from the stress of necessity, by which stock is given as a bonus for the purchase of bonds, or otherwise. Such stock, if issued by a domestic corporation, would be free from taxation, while the full amount of the tax would be imposed if it were issued by a foreign corporation. A domestic corporation with an authorized capital of $100,000, all of which has been subscribed and issued, may begin business in Kansas with 20 per cent of the capital paid in. Such a corporation under the statute would pay an annual license of twenty-five dollars, but a foreign corporation under identical circumstances and conditions would pay one hundred and twenty-five dollars, and if the words "property and business" mean that to the value of the property of foreign corporations in Kansas must be added the amount or value of their business done, which in turn is compared only with the value of their property outside of Kansas, they are further discriminated against, because no similar requirement is placed upon domestic corporations. The Supreme Court of Kansas answered this suggestion by stating that the phrase "issued capital stock" refers to the actual investment, because the fee is regulated by the proportion of the issued stock that is devoted to its Kansas business. Manifestly this is incorrect. The investment

is only important when the amount and value of a foreign corporation's property in Kansas is ascertained, but when the tax is levied by the statute, all of the issued stock is considered whether it represents value or whether a consideration was paid for it or not. An example will serve to illustrate the incorrectness of the position of the Supreme Court of Kansas. The value of the property of a foreign corporation used in Kansas may be one-tenth of its total value. If that corporation had issued twenty million dollars in stock, ten million of which was issued as a bonus to induce the purchase of bonds and the remaining ten million represented actual investment, the Kansas statute would require the payment of a one thousand dollar tax. Yet if "actual investment," to use the language of the Supreme Court of Kansas, were the basis it would pay but a tax of five hundred dollars. The statute in question does not provide for an impartial application of the same means and methods to each class, so that the law operates equally and impartially on all corporations in similar circumstances. While a legislature has the power to classify, this power is limited to such an exercise in the power to tax as will avoid clear discrimination between corporations doing business under identical circumstances and conditions. In the language of

this Court in *American Smelting and Refining Co. v. Colorado*, 204 U. S. 103, 115:

> "Whatever be the name or nature of the tax, it must be measured in amount by the same rate as is provided for the domestic institution, and if the latter is not taxed in that way, neither can the State thus tax the foreign corporation."

The situation here cannot be distinguished from that before this Court in *Southern Ry. Co. v. Greene*, 216 U. S. 400, 418, where a statute of Alabama imposes an annual franchise tax on foreign corporations in excess of the amount charged domestic corporations. In holding that the statute was void, in that it denied the equal protection of the laws to foreign corporations, this Court said:

> "We hold, therefore, that to tax the foreign corporations for carrying on business under the circumstances shown, by a different and much more onerous rule than is used in taxing domestic corporations for the same privilege, is a denial of the equal protection of the laws, and the plaintiff being in position to invoke the protection of the Fourteenth Amendment, that such attempted taxation under a statute of the States, does violence to the Federal Constitution."

It is respectfully submitted that the Kansas statute is but another chapter in the history of the attempt of

the legislature of that State to impose burdens upon the entire business of foreign corporations as a condition upon their right to enter and do business of any kind within that State, and that the same rule should be applied here as this Court has promulgated in its decisions by which companion statutes of the State of Kansas have been held ineffective to burden interstate commerce and to deny foreign corporations the equal protection of the laws.

PAUL E. WALKER.

Attorney for the Chicago, Rock Island and Pacific Railway Company.

APPENDIX.

EXHIBIT A.

General Statutes of Kansas 1901, Section 1283.

"It shall be the duty of the president and secretary or of the managing officer of each corporation for profit doing business in this State, except banking, insurance and railroad corporations, annually, on or before the 1st day of August, to prepare and deliver to the Secretary of State a complete detailed statement of the condition of such corporation on the 30th day of June next preceding. Such statement shall set forth and exhibit the following, namely: 1st. The authorized capital stock. 2d. The paid-up capital stock. 3d. The par value and the market value per share of said stock. 4th. A complete and detailed statement of the assets and liabilities of the corporation. 5th. A full and complete list of the stockholders, with the postoffice address of each, and the number of shares held, and paid for by each. 6th. The names and postoffice addresses of the officers, trustees or directors and manager elected for the ensuing year, together with a certificate of the time and manner in which such election was held. Such reports shall be made upon

and in conformity to blanks prepared by the Secretary of State and approved by the charter board. The fee for filing such report and making a certificate that the same has been made and is on file shall be one dollar. The Secretary of State may at any time require a further or supplementary report under this section, which shall contain the same information and data as specified in the annual report herein required; and the failure of any such corporation to file the statement in this section provided for within ninety days from the time provided for filing the same shall work the forfeiture of the charter of any corporation organized under the laws of this State, and the charter board may at any time thereafter declare the charter of such corporation forfeited, and upon the declaration of any such forfeiture it shall be the duty of the attorney-general to apply to the District Court of the proper county for the appointment of a receiver to close out the business of such corporation; and such failure to file such statement by any corporation doing business in this State and not organized under the laws of this State shall work a forfeiture of its right or authority to do business in this State, and the charter board may at any time declare such forfeiture, and shall forthwith publish such declaration in the official State paper. It shall also be the duty of the president and secretary of any such corporation organized under the laws of this State,

as soon as any transfer, sale or change of ownership of any such stock is made as shown upon the books of the company, to file with the Secretary of State a statement of such change of ownership giving the name and address of the new stockholder or stockholders, the number of shares so transferred, the par value, and the amount paid on such stock. No transfer of such stock shall be legal or binding until such statement is made as provided for in this act. The record of the Secretary of State shall be *prima facie* evidence of the stockholders of such corporations, the number of shares held by each, and the amount paid on each share of capital stock. No action shall be maintained or recovery had in any of the Courts of this State by any corporation doing business in this State without first obtaining the certificate of the Secretary of State that statements provided for in this section have been properly made."

EXHIBIT B.

Laws of Kansas 1907, Chapter 140, Section 29, Appearing in General Statutes of Kansas 1909 as Section 1726.

"Every corporation for profit doing business in this State, except banking, insurance and railroad corporations, shall file in the office of the Secretary of State, during the month of February of each year, a statement of the condition of the corporation at the

close of business on the 31st day of December next preceding the date of filing The Secretary of State shall prepare and furnish blank forms for such annual statements. The statement to be made by a domestic corporation shall set forth the following: (1) The authorized capital. (2) The paid-in capital. (3) The par value of the shares of the capital stock. (4) A complete and detailed statement of the assets and liabilities of the corporation. (5) A complete list of the stockholders, with the postoffice address of each and the number of shares held by each. (6) The names and addresses of the officers, trustees or directors and manager elected for the ensuing year The annual statement to be filed by a foreign corporation shall set forth: The full corporate name of such corporation; the location of its principal office or place of business without this State; the location of its principal office or place of business within this State, if any it has; the names and addresses of its officers and directors; the amount of its authorized capital stock and the amount of each share; the amount of its capital stock subscribed; and the amount and general nature of its resources and liabilities, in a form to be prescribed by the Charter Board. Such statement shall be subscribed and sworn to by the president or general manager and by the secretary of such corporation, and shall be made upon a blank furnished by the Secretary of State. The fee

for filing such report and making a certificate that the same has been made and is on file as aforesaid shall be one dollar. The Secretary of State may at any time require a further or supplementary report under this section, which shall contain the same information and data as specified in the annual report herein required. The failure of any corporation to file the annual statement herein provided for within ninety days from the time provided for filing the same shall work the forfeiture of the charter of any corporation organized under the laws of this State, and the Charter Board may at any time thereafter declare the charter of such corporation forfeited; and upon the declaration of any such forfeiture it shall be the duty of the Attorney-General to apply to the District Court of the proper county for the appointment of a receiver to close out the business of such corporation; and the failure of any foreign corporation to file such annual statement, as heretofore provided shall work a forfeiture of its right or authority to do business in this State, and the Charter Board may at any time declare such forfeiture, and shall forthwith publish such declaration in the official State paper. No action shall be maintained or recovery had in any of the Courts of this State by any corporation doing business in this State without first obtaining the certificate of the Secretary of State that the annual statements herein provided for have been filed as required by this act."

EXHIBIT C.

October 15, 1913.

Hon. Chas. H. Sessions,
Secretary of State,
State House.

Dear Mr. Sessions:

Touching the communication of Paul Walker, General Attorney for the Rock Island Lines, and which refers to certain features of the new corporation tax law, I beg to say:

Sec. 2 of Chap. 135 of the Session Laws of 1913 will give no trouble at all to the big corporations like the Rock Island. Sec. 2 requires a comprehensive annual report to be made by the corporation, but you will note that Sec. 12 provides:

> "Corporations required by other statutes to make detailed reports to other departments of state are hereby excused from making the detailed reports specified in sections 1 and 2 of this act, but such corporations shall annually report, under this act, to the Secretary of State concerning their authorized and issued and paid up capital so that the proper amount of their annual fees under this act can be accurately determined and collected."

Corporations like the Rock Island make elaborate and detailed reports to the Public Utilities

Commission and the report which you will require from railroads like the Rock Island need only state their authorized and issued and paid up capital. The only information can be gleaned by the Secretary of State from the files of the Public Utilities Commission.

Now as to Mr. Walker's question concerning the basis upon which the tax shall be imposed: doubtless there will be many close questions for the Secretary of State to decide but these will hardly arise in estimating the tax on the big railroad corporations. You will note "that when the paid up capital stock exceeds five million dollars, the annual fee shall be two thousand five hundred dollars." The Rock Island is a foreign corporation and its annual fee shall be determined on "the proportion of the issued capital stock of the company represented by its property and business in Kansas." And at the close of Sec. 2 it says: "when the issued capital stock used in Kansas exceeds five million dollars the annual fee shall be two thousand five hundred dollars."

I understand that in railroad practice it is common to speak of the capitalization of a company as including both its stock and funded debts. The capital stock of the Rock Island is $74,000,000

and the funded or bonded debt $225,000,000, omitting some odd figures. The Rock Island proper has 5,369 miles of railroad of which 1,071 miles are in Kansas. Roughly speaking one-fifth of its mileage is in Kansas. Again, the gross earnings last year were $61,000,000, of which about $12,000,000 were in Kansas, or one-fifth. Omitting the bonds, there is $13,946.00 worth of stock issued against each mile of the Rock Island system proper, and on the Kansas mileage this would be something over $14,000,000.

Using any of these rough systems of computation, the Rock Island has upwards of one-fifth of its capital devoted to its Kansas business and upwards of $12,000,000 or $14,000,000 devoted to its Kansas business—perhaps a good deal more than that; and since there can be no doubt that it has more than $5,000,000 of its paid up capital devoted to its Kansas business, the annual fee under this act for the Rock Island railroad will be $2,500.00.

Yours respectfully,

JOHN S. DAWSON,

Attorney-General.